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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible] 177

GEORGE E. BOWLING AND MIAMI INVESTMENT COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JANUARY 25, 1912.

(23,033)

(23,033)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 532.

GEORGE E. BOWLING AND MIAMI INVESTMENT COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1912.

Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1911, of said Court, Before the Honorable Walter H. Sanborn, Circuit Judge, and the Honorable John A. Marshall and the Honorable William H. Munger, District Judges.

Attest:

[Seal United States Circuit Court of Appeals Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the first day of April, A. D. 1911, a transcript of record, pursuant to an appeal allowed by the Circuit Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein George E. Bowling and Miami Investment Company are Appellants and The United States of America is Appellee, which said transcript of record is in the words and figures following, to-wit:

a In the Circuit Court of the United States for the Eastern District of Oklahoma.

George E. Bowling and Miami Investment Co., Appellants,
No. .... vs.
The United States of America, Appellee.

The following is a transcript of such of the record and proceedings heretofore had in said cause as has been ordered to be prepared and authenticated as necessary to the hearing in the Court of Appeals.

The Bill of Complainant was filed in the office of the Clerk on the Sept. 8th, 1908, and is in words and figures as follows:

1 In the Circuit Court of the United States for the Eastern District of Oklahoma.

The United States of America, Complainant,
vs. In Equity.

John E. Rundell and Florence Rundell, his wife; George E. Bowling and Jennie Bowling, his wife; Bartlett Cooley and Kate J. Cooley, his wife; Eugene Albright and Kate Albright, his wife; Miami Investment Company, a corporation; Charles E. Swan and Mildred E. Swan, his wife; W. H. Grant and Sadie Grant, his wife; Hi Fee and Mary M. Fee, his wife; Barton County Building and Loan Association, a corporation; J. F. Robinson; W. L. McWilliams; Mary Buck and ..... Buck, her husband; Charles Stanley; Orille Keno Mohawk and John Mohawk, her husband; Mary Bigknife; and W. I. Bingham, J. E. Supernaw and J. K. Stephens, County Commissioners and Ottawa County, Oklahoma, Defendants.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Oklahoma, in Equity:

The United States of America, by Charles J. Bonaparte its Attorney General, brings this bill against the defendants, W. L. McWilliams, J. F. Robinson, Miami Investment Company, a corporation organized and existing under and by virtue of the laws of the United States in force in the Indian Territory at the time of its organization and now existing under
2 the laws of the State of Oklahoma; Charles E. Swan and Mildred E. Swan, his wife; W. H. Grant and Sadie Grant, his wife; Hi Fee and Mary M. Fee, his wife; Mary

Buck and ..... Buck, her husband; Charles Stanley; Mary Bigknife; Orillo Keno Mohawk and John Mohawk, her husband; W. I. Bingham, J. E. Supernaw and J. K. Stephens, County Commissioners of Ottawa County, Oklahoma, who are each and all residents of the State of Oklahoma, residing in the Eastern Judicial District thereof; and against the defendants, George E. Bowling and Jennie Bowling, his wife, who are residents and citizens of the State of Missouri, residing in Jackson County in said State; the Barton County Building and Loan Association, a corporation organized and existing under the laws of the State of Missouri and having its principal office at Nevada, Barton County, Missouri, being a resident and citizen of the State of Missouri; and against the defendants, Bartlett Cooley and Kate J. Cooley, his wife, and John E. Rundell and Florence Rundell, his wife, who are residents and citizens of the State of Kansas, residing at Galena, Cherokee County of said State; and against the defendants, Eugene Albright and Kate Albright, his wife, who are residents and citizens of the State of Illinois, residing in the City of Chicago in said State; and thereupon your orator complains and says:

First.

That in granting lands to the Indian tribes and the members thereof, especially the Confederated Wea, Peoria, Kaskaskia and Piankeshaw Tribes of Indians, it became and was the policy of the United States Government to grant such lands only upon such terms, conditions and limitations as would insure to the grantees the retention and conservation of the lands so granted. Your orator further shows that because of the weak, helpless and dependent character of the Indian people it also became and was and is its policy in making such
3 grants to the Indian tribes and the members thereof to guarantee and promise to secure to the grantees, their heirs and successors, the exclusive possession and full enjoyment of the lands so granted.

Second.

Your orator further shows that on account of the weak, helpless and defenceless character of the Indian tribes and the members thereof, the United States Government has always and now does assume the relation of guardian over the Indian tribes and the members thereof; that its political department has always declared and now declares such relation to exist, and that it brings this bill on behalf of certain members of the Confederated Wea, Peoria, Kaskaskia and Piankeshaw Tribes of Indians, to-wit, the unknown heirs of Pe-te-lon-o-zah, or William Wea, deceased, as well as upon its own behalf.

Third.

Your orator further shows that by an Act of Congress approved March 2, 1899, entitled "An Act to provide for allotment of land in severalty to the United Peoria and Miamies in Indian Territory, and for other purposes," (25 Stats. 1013), the Secretary of the Interior was authorized and directed to allot in severalty to the members of the said Confederated Wea, Peoria, Kaskaskia and Piankeshaw Tribes of Indians a certain quantity of land within the limits of the reservation theretofore granted to the said Confederated Tribes of Indians for their use and occupancy, upon the same guaranties mentioned and set forth in the first paragraph hereof, which said lands were on the date of said Act of Congress and have ever since been occupied by the said Confederated Tribes of Indians. And

4 your orator further shows that by the said Act of Congress the land so allotted in severalty was not to be subject to alienation for twenty-five years from the date of the issuance of the patent therefor, and that said lands so allotted and patented were to be exempt from levy, sale, taxation or forfeiture for a like period of years, and that the Secretary of the Interior [as] to cause a patent to issue to each and every person so entitled for his or her allotment, and that such patent was to recite in the body thereof a restriction upon alienation thereof, as provided in the Act, and was also to recite the immunities from levy, sale, taxation and forfeiture for a like period of years, as provided in said Act. And your orator further shows that by said act any contract or agreement to sell or convey said lands or allotment so patented entered into before the expiration of said twenty-five years was to be absolutely null and void.

Fourth.

Your orator further shows that under and by virtue of the aforesaid Act of Congress and in accordance with the terms and provisions thereof, the said Pe-te-lon-o-zah, or William Wea, during his life time selected and had set apart to him, as his distributive share of the lands belonging to said tribe, in the Indian Territory, the following described lands, to-wit:

The North Half of the Northeast Quarter and Lots numbered Three and Four of Section 25, and Lot numbered One of Section 27, in Township 28, North, Range 22 East; and Lots numbered One and Two of Section 30, Township 28 North, Range 23 East of the Indian Meridian, Containing in the aggregate 198.88 acres;

which said lands are located within the Eastern District of Oklahoma and within the jurisdiction of this Court. And your

orator further shows that the said selection as the personal allotment of the said Pe-te-lon-o-zah, or William Wea, was duly approved by the Secretary of the Interior in accordance with the provisions of said Act of Congress; that afterwards and on, to-wit, the 8th day of April, 1890, there was duly issued to the said Pe-te-lon-o-zah, or William Wea, by the President of the United States, the Honorable Benjamin Harrison, a patent for the above described lands, which patent conveyed said lands unto the said Pe-te-lon-o-zah, or William Wea, and his heirs, upon the terms, conditions, limitations and immunities of the Act of Congress hereinbefore referred to, to-wit, that said lands should not be alienated nor be subject to levy, sale, taxation or forfeiture for a period of twenty-five years from the date thereof and that any contract or agreement to sell or convey said land before the expiration of said period should be absolutely null and void; a full, true and correct copy of which patent is hereto attached, marked Exhibit A and made a part of this bill.

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Fifth.

Your orator further shows that the said Pe-te-lon-o-zah, or William Wea, died intestate on or about the 23rd day of January, 1894, seized of the real estate above described leaving as his heirs at law a number of persons, whose names and places of residence are to your orator unknown and which he is unable to set out in this bill, which said several heirs are entitled to take said land and the estate and interest of the said Pe-te-lon-o-zah, or William Wea, therein, by inheritance, under the law of descent and distribution in force at the time of his death governing the descent and distribution of the real estate of the Peoria and Miami Indian Tribes.

Sixth.

Your orator further shows that afterwards and on, to-wit, the 2nd day of December, 1897, the defendant, John E. Rundell, in violation and defiance of the provisions of said Act of Congress, unlawfully and inequitably induced certain persons, viz., Charles Stanley, Mary Bigknife and Orillo Keno Mohawk, who claimed and represented themselves to be heirs at law of the said Pe-te-lon-o-zah, or William Wea, for a purported consideration of twenty-five dollars, to make, execute and deliver to the said defendant, John E. Rundell, and took and accepted from the said persons, their deed purporting to convey to him the lands hereinbefore described, and that afterwards and on, to-wit, the 31st day of May, 1899, the said John E. Rundell and wife, Florence Rundell, executed and delivered their quit claim deed, for the purported con-

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sideration of one thousand dollars, to the defendant, George E. Bowling; that afterwards and on, to-wit, the 14th day of August, 1899, the said George E. Bowling and wife, Jennie Bowling, executed and delivered to the said John E. Rundell, their quit claim deed to the premises hereinbefore described, for the purported consideration of one dollar; that afterwards and on, to-wit, the 17th day of May, 1901, the defendants, John E. Rundell and his wife, Florence Rundell, executed and delivered to the defendant Bartlett Cooley, their quit claim deed to the premises hereinbefore described, for the purported consideration of One thousand six hundred dollars; and that thereafter the defendants, George E. Bowling and Jennie Bowling, his wife, Bartlett Cooley and Kate J. Cooley, his wife, Eugene Albright and Kate Albright, his wife, executed and delivered to the defendant, Miami Investment Company a corporation, their quit claim deed, under date of September 6, 1901, conveying to the said corporation the lands hereinbefore described, for a purported consideration of seven thousand five hundred dollars. That thereafter and on, to-wit, the 19th day of November, 1901, the said defendant, Miami Investment Company, a corporation, caused the land hereinbefore described to be surveyed into lots and blocks, streets and alleys, and platted into an addition to the town of Miami, known and designated as the Miami Investment Company's First Addition to Miami, Indian Territory, and caused said plat together with the dedication thereof and of the streets and alleys in said plat to public use, to be filed for record on the 30th day of November, 1901, in the office of the Clerk of the United States Court at Miami, Indian Territory. The Said purported dedication of the streets and alleys by said Miami Investment Company to the use of the public was an unlawful and unequitable invasion of the rights of complainant and of the right of the heirs at law of the said Pe-te-lon-o-zah, or William Wea, in said land, and was wholly unauthorized in law or equity; that the defendants W. I. Bingham, J. E. Supernaw and J. K. Stephens, constituting the Board of County Commissioners of Ottawa County, Oklahoma, now represent whatever right, title or interest the public acquired or now have in said streets and alleys in the Miami Investment Company's First Addition to the town of Miami, the title, if any, to said streets and alleys being vested by law in the County of Ottawa, Oklahoma, in trust for the public. That afterwards and on, to-wit, the 26th day of November, 1901, the Miami Investment Company sold and conveyed Lot numbered Sixteen in Block numbered One of the Miami Investment Company's First Addition to the Town of Miami, to the defendant, Charles E. Swan, who afterwards executed a mortgage on said Lot to the defendant Barton County Building and Loan Association, a

corporation to secure the payment of the sum of two hundred dollars; that afterwards and on, to-wit, the 25th day of April, 1902, the defendant, Miami Investment Company, a corporation, conveyed to the defendant, W. H. Grant, Lot Numbered Nine in Block Numbered Six of the Miami Investment Company's First Addition to the town of Miami, and afterwards and on, to-wit, the 6th day of June, 1902, the said W.
8 H. Grant and Sadie Grant, his wife, executed to the defendants, George E. Bowling and Eugene Albright, a mortgage on said Lot to secure the payment of the sum of three hundred dollars; that afterwards and on, to-wit, the 29th day of September, 1902, the defendants, Charles E. Swan and Mildred E. Swan, his wife, sold and conveyed Lot numbered Sixteen in Block numbered One of the Miami Investment Company's First Addition to the town of Miami, to the defendants, Hi Fee and Mary M. Fee, his wife, subject to the mortgage thereon to the defendant, Barton County Building and Loan Association.

Seventh.

Your orator further shows that each, all and every of the said several written instruments of conveyance heretofore executed and delivered by the said several defendants and parties thereto, whether claiming to be the heirs of the said Pe-te-lon-o-zah, or William Wea, deceased, or grantees thereof, are wholly and absolutely void, in law and in fact, for the reason that each and all of the said several instruments were made, executed and delivered within the time named in the original patent from the United States to the said Pe-te-lon-o-zah, or William Wea, within which the said lands should not be alienated or subject to levy, sale, taxation or forfeiture, and without the approval of the Secretary of the Interior and without his authority therefor, as required by law.

Eighth.

Your orator further shows that each of the several instruments of conveyance hereinbefore referred to have been filed and duly recorded and by reason of the existence of the deeds herein referred to of record and by reason of the pretended title thereunder asserted by the several persons named as grantees therein, the titles to the lands hereinbefore described are clouded and incumbered and the interests of the law-
9 ful heirs of the said Pe-te-lon-o-zah, or William Wea, deceased, in said lands are thereby greatly depreciated in value. And your orator further shows that each and all of the said several deeds of conveyance and instruments of writing purporting to convey the right, title estate and interest of the heirs of Pe-te-lon-o-zah, or William Wea, in and to the real

estate hereinbefore described are void and of no effect and were taken in violation, disregard and defiance of the provisions of law under which said lands were patented by the United States to the said Pe-te-lon-o-zah, or William Wea, deceased, and are ineffectual as instruments of conveyance, both as against the parties executing the same and the lawful heirs of the said Pe-te-lon-o-zah, or William Wea, for whose use and benefit this action is prosecuted by the plaintiff herein.

Ninth.

Your orator further shows that on the 19th day of May, 1899, in an action then pending in the United States Court for the Northern District of the Indian Territory, at Wagoner, wherein the defendants, Charles Stanley, Mary Bigknife, Orillo Keno Mohawk and John Mohawk, her husband, were plaintiffs, and the defendant John E. Rundell, was defendant, judgment was rendered in favor of the plaintiffs named in said suit and defendants herein, adjudging and decreeing the validity of a certain contract theretofore made and entered into, by the terms of which the said plaintiffs, Charles Stanley, Mary Bigknife, Orillo Keno Mohawk and John Mohawk, her husband, covenanted and agreed to convey to the defendant therein, John E. Rundell, the lands hereinbefore described, being the allotment made to Pe-te-lon-o-zah, or William Wea, deceased. That in said action it was alleged by the plaintiffs that they had entered into a contract to sell and convey said lands to the defendant, John E. Rundell, for the consideration of one thousand dollars; that twenty-five dollars of said consideration had been paid and that there remained due and unpaid to them the sum of nine hundred and seventy-five dollars. They further alleged that they were the sole heirs of Pe-te-lon-o-zah or William Wea, deceased; that they had a full and perfect right to sell and convey said lands and tendered their deed of conveyance therefor to the defendant, John E. Rundell, and demanded judgment against him for the sum of Nine hundred and seventy-five dollars, being the balance due on their contract of sale. A copy of the petition filed in said cause is fully set out as Exhibit B to this bill of complaint and by reference thereto is hereby made a part hereof. That afterwards the defendant John E. Rundell, by and on his own behalf, filed his answer admitting the execution of the contract set out in plaintiff's petition in said suit, but denying that the plaintiffs therein were the sole heirs of Pe-te-lon-o-zah, or William Wea, deceased, and further denying that the said plaintiffs at the time of the filing of said petition had the right to sell and convey said lands and asked to be relieved and discharged of the obligation of accepting the deed and paying the balance due under the contract of purchase. A copy of the

answer of said defendant is fully set out as Exhibit C to this bill and is by reference thereto hereby made a part hereof.

Tenth.

Your orator further shows that the said action and the pleadings filed therein and the issues raised thereby were a part of a fraudulent scheme entered into by the defendant, John E. Rundell, at the time said contract of sale was made and carried on and conducted by him for the purpose and with the intent of securing under color of a decree of court a title to the land hereinbefore described, being the allotment made to Pe-te-lon-o-zah, or William Wea, and for the purpose of circumventing and evading the provisions of the Act of Con-
11 gress under which said lands were allotted to said Pe-te-lon-o-zah, or William Wea, and in violation of the terms and conditions of the allotment deed issued for said lands in pursuance and under the authority of said Act of Congress authorizing the allotment of lands to members of the Peoria-Miami band of Indians in the Indian Territory. That said pretended civil suit so as aforesaid prosecuted in the United States Court for the Northern District of the Indian Territory, at Wagoner, was not a real and substantial controversy between the parties thereto; that the defendant in said suit, John E. Rundell, in truth and in fact employed and paid the attorney who purported to represent the plaintiffs in said suit and that said attorney was in truth and in fact the attorney and representative of the defendant, John E. Rundell, and that the judgment procured in said action was obtained by reason of the fraud and deception of the parties thereto practised upon the court. And your orator further shows that neither the United States nor any of its officers, agents or representatives and especially none of the officers, agents or representatives of the Secretary of the Interior, were made parties to said suit. That at the time of the making of said pretended contract of sale and conveyance of said lands and at the time of the commencement of the suit above described for the enforcement of said contract, the Secretary of the Interior had the direct management, control and supervision of all of the lands of the allottees of the Peoria-Miami band of Indians in the Indian Territory and especially the lands hereinbefore described, being the lands allotted to Pe-te-lon-o-zah, or William Wea, deceased.

Eleventh.

Your orator further shows that at the time of the rendition of the judgment in said cause, to-wit, the 19th day of May, 1899, the said United States Court for the Northern
12 District of the Indian Territory, sitting at Wagoner had no jurisdiction of the subject matter of said suit and

had no jurisdiction to render a decree binding upon the plaintiffs therein who were members of the Peoria-Miami band of Indians in the Indian Territory, by which their right, title, estate or interest in any lands belonging to them in the Indian Territory could be alienated, divested or conveyed. That said plaintiffs, Charles Stanley, Mary Bigknife and Orillo Keno Mohawk, had no legal capacity to sue and could not lawfully maintain such action in the said United States Court for the Northern District of the Indian Territory, and that said court was without jurisdiction to render any judgment or decree in said cause which could be binding upon them or which would be binding upon or effect the right, title and interest of the United States in said lands as trustee for the members of the Peoria-Miami band of Indians in the Indian Territory, and that as against the plaintiff herein, the United States of America, and as against the lawful heirs of Pe-te-lon-o-zah, or William Wea, deceased, for whose use and benefit this action is brought, said judgment so as aforesaid obtained is wholly void and of no force or effect; all of which acts and doings are and were unlawful and against equity and good conscience and tend to the manifest wrong and injury of the complainant and to the unknown heirs of the said Pe-te-lon-o-zah, or William Wea, deceased.

Twelfth.

And your orator further shows that all of the said unlawful and inquitable acts and doings of the defendants were in open violation, defiance and evasion of the laws of the United States relating to the disposal of its property, and of the will of Congress with respect thereto, and in open violation, defiance and in evasion of the duty owing to the Indians by the Complainant by reason of the said treaty obligations and laws of
13 the United States; that all of the said unlawful and inequitable acts and doings of the said defendants and the effect thereof are prejudicial to the care, control and governance of the said Indian tribes and the members thereof; and your orator further shows that it is the manifest duty of the Complainant, as the sovereign government, by reason of its guarantees to the said tribes of Indians and the members thereof, to protect them in the enjoyment and peaceful possession of the lands granted to them by the United States against any unlawful interference or occupation by others; and by reason of the guardianship over the said tribes of Indians and the members thereof as declared by the political department of the United States, to bring this bill in order to cancel, annul and render of no effect all of the said unlawful and inequitable acts and doings of the defendants herein in this bill set forth and mentioned.

And your orator further shows that this action is also brought for the purpose of declaring and establishing the right, title and interest of the heirs of the said Pe-te-lon-o-zah or William Wea, deceased, in the lands hereinbefore described, arising under and by virtue of the various acts of Congress providing for the allotment and patenting of the lands belonging to the Peoria-Miami Indian Tribes in the Indian Territory and governing the descent and distribution thereof to the heirs of deceased allottees of said tribes of Indians, and for the purpose of canceling all purported conveyances of said lands executed by whomsoever in violations of the provisions of the laws of the United States governing the alienation, sale and transfer of said lands, so that the same may come to the heirs of the said Pe-te-lon-o-zah, or William Wea, deceased, free and clear of all incumbrances or clouds, as by the laws of the United States they are entitled to receive the same.

14 For as much as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed and makes a full disclosure and discovery of the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived,

Your orator prays that this Honorable Court by its decree shall adjudge and declare that the said several instruments of conveyance and deeds hereinbefore described, executed successively to the defendants, John E. Rundell, George E. Bowling, Bartlett Cooley, Miami Investment Company, a corporation, Charles E. Swan, Barton County Building and Loan Association, W. H. Grant, George E. Bowling and Eugene Albright, Hi Fee and Mary M. Fee, and each of them, be adjudged and decreed to be void and of no effect as instruments of conveyance and that the same be cancelled, annulled and held for naught; and that the attempted and purported dedication to the use of the public of that portion of the above described real estate contained in the streets and alleys of the Miami Investment Company's First Addition to the town of Miami be adjudged and decreed by the Court to be a nullity and of no binding force or effect as against complainant or the heirs at law of the said Pe-te-lon-o-zah, or William Wea, deceased. That the Judgment heretofore rendered on the 19th day of May, 1899, by the United States Court for the Northern District of the Indian Territory, sitting at Wagoner, in favor of Charles Stanley, Mary Bigknife, Orillo Keno Mohawk and John Mohawk, her husband, against the defendant, John E. Rundell,

be adjudged and decreed to be of no binding force or effect, insofar as it attempts to provide for or decree the sale,
15 alienation and transfer of the lands hereinbefore described, to-wit:

The North Half of the Northeast Quarter and Lots numbered Three and Four of Section 25, and Lot numbered One of Section 27, in Township 28, North, Range 22 East; and Lots numbered one and Two of Section 30, Township 28 North, Range 23 East of the Indian Meridian, containing in the Aggregate 198.88 acres,

or any part thereof, or any interest therein. That the interest, or purported interest claimed by the defendants in said real estate, or any part thereof, under and by virtue of said deeds above referred to, or either of them, or under and by virtue of the judgment and decree of the said United States Court for the Northern District of the Indian Territory, sitting at Wagoner, of date May 19th, 1899, be adjudged and decreed to be valid and of no force or effect as against the lawful heirs of said Pe-te-lon-o-zah, or William Wea, deceased; that the said several defendants and each of them and all persons claiming by, through or under them, or either of them, be by the judgment and decree of this Court, forever barred and foreclosed of and from all right, title, estate and interest in and to the lands hereinbefore described, or any part thereof, adverse to the right, title, estate and interest of the lawful heirs of the said Pe-te-lon-o-zah, or William Wea, deceased, therein, and that the interest of said defendants and each of them and of all persons privy thereto or who claim any right, title or interest in the real estate hereinbefore described by or through them, or either of them, be adjudged and decreed by this Court to be second subject, junior and inferior to the right, title, estate and interest of the lawful heirs of the said Pe-te-lon-o-zah, or William Wea, deceased, in and to said real estate, and that the plaintiff have and recover for and on behalf of the heirs at law of the said Pe-te-lon-o-zah, or William Wea, deceased, all such other and further relief as in equity
16 and good conscience to the Court shall seem right and proper, under the premises herein.

CHARLES J. BONAPARTE,
Attorney General of the United States and
WM. J. GREGG,
U. S. Dist. Atty.

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Exhibit A.

The United States of America.

To all to Whom These Presents shall come—Greeting:

Whereas, There has been deposited in the General Land office of the United States an order bearing date February 27, 1890, from the Secretary of the Interior, directing the patenting of certain selections made by the Confederated Wea, Peoria, Kaskaskia and Piankeshaw tribes of Indians as contemplated by the Act of Congress, approved March 2, 1889, entitled "An Act to provide for allotment of land in severalty to the United Peorias and Miamies in Indian Territory, and for other purposes," (25 Stat. 1013), from which it appears that pursuant to said Act Pe-te-lon-o-zah, or William Wea, a member of the Wea, Peoria, Kaskaskia and Piankeshaw tribe has selected the following described tract of land, to-wit: the North half of the Northeast Quarter, and lots numbered three and four of section twenty-five and lot numbered one of section twenty-seven, in township twenty-eight, North, of Range twenty-two East, and lots numbered one and two of section thirty, in township, twenty-eight North, of Range Twenty-three East of the Indian Meridian in the Indian Territory, containing in the aggregate one hundred and ninety-eight and eighty-eight hundredths of an acre, which selection was duly approved by the Secretary of the Interior in accordance with the provisions of said Act.

And Whereas, it is made to appear that in making of said selection and allotment, said statute has in all its requirements been duly complied with.

Now know ye, That the United States of America, in consideration of the premises and in conformity with the terms of said act, selection, order and list, aforesaid, has given and granted and by these presents does give and grant unto the said Pe-te-lon-o-zah, or William Wea, and his heirs, the tract of land above described: Provided, That the said lands shall not be alienated nor subject to levy, sale, taxation, or forfeiture for a period of twenty-five years from the date hereof, and any contract or agreement to sell or convey said land before the expiration of said period shall be absolutely null and void; to have and to hold the said land with the appurtenances thereunto belonging unto the said Pe-te-lon-o-zah, or William Wea, and to his heirs forever, with proviso as aforesaid.

In Testimony Whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this eighth day of April in the year of our Lord one thousand eight hundred and ninety and of the Independence of the United States, the one hundred and fourteenth.

By the President: BENJAMIN HARRISON,
By M. McKean, Secretary.

(Seal) J. M. TOWNSEND,
Recorder of the General Land Office.

18 Exhibit B.

Complaint in Equity.

United States, Indian Territory,
Northern Judicial District.

In the United States Court in Said District.

Held at Wagoner.

Charles Stanley, Mary Bigknife, Orillo Keno Mohawk, and Husband, John Mohawk, Plaintiffs,
vs.
John E. Rundell, Defendant.

Plaintiffs, Charles Stanley, Mary Bigknife, Orillo Keno Mohawk and John Mohawk, her husband, state that they are citizens of the United States residing in the Northern Judicial District of the Indian Territory and that the defendant, John E. Rundell, is doing business in and may be found in the said District.

Plaintiffs further state that on or about the ... day of ..., A. D. 189.., One, William Wea, member of the United Peoria and Miami tribe of Indians, departed this life and that at the time of his death he was the owner in fee simple and in the peaceable possession of the following described lands, to-wit: The N 2 of the NE4 and lots numbered 3 and 4 of Section 25 and lot numbered 1 in Section 27, all in Township 28 North of Range 22 East, and lots numbered 1 and 2 of Section 30 in Township 28 North of Range 23 East of the Indian Meridian, all in the Quapaw Agency, Indian Territory, containing 198.85; that the said lands were allotted to the said William Wea under an act of Congress entitled "An Act to provide for the allotment of lands in severalty to the United Peoria and Miami Indians in the Indian Territory, and for other purposes," passed and approved March 2, 1889, and was duly patented by

the United States to the said William Wea, deceased, under and by virtue of the provisions of said act.

That at the death of the said William Wea, deceased, he left neither wife nor children and that the plaintiffs were and are his sole heirs at law and that under and by virtue of the law the said land at the death of the said William Wea, deceased, descended to and become the property of these plaintiffs who now own the same.

Plaintiffs further represent to the Court that the patent issued as aforesaid to the said William Wea, deceased, conveying to him the said land contained under and by virtue of the said act of Congress the following restrictions on the power of sale, to-wit:

"Provided that the said land shall not be alienated nor subject to levy, sale, taxation or forfeiture for a period of twenty-five years from the date hereof and any contract or agreement to sell or convey said land before the expiration of said
19 period shall be absolutely null and void"; and plaintiffs further represent and state to the Court that the said restriction was a personal disability as against the said William Wea, deceased, and not a limitation on the title by which the said land was held and that the said land descended to these plaintiffs as the heirs at law of the said William Wea, deceased, freed from the said restrictions and with the full right and power to convey same as to them might seem just and proper. Plaintiffs further represent and state to the Court that on the 2nd day of December, 1897, they made a contract with the said defendant, John E. Rundell, a copy of which contract is hereto attached and made a part hereof and marked Exhibit A, by which they agreed to convey to the said John E. Rundell by a good and sufficient warranty deed the said land above described for the price and sum of $1000.00, 25.00 of which was paid to these plaintiffs when the said contract was executed, and all of the balance was to be paid when the plaintiffs established their rights to the said lands as heirs at law of the said William Wea, deceased, and their right to convey same and on the execution and delivery to the said defendant of a good and sufficient warranty deed conveying to him the said land and the said defendant agreed to take the said land on the said terms and make the payments as above set forth.

Plaintiffs now come and offer to establish their rights to the said lands as above set forth and also their right to convey same and to make the deed as above set forth.

They therefore ask the Court to make a decree establishing the rights of the plaintiffs to the said land as aforesaid and their right to convey same and directing that plaintiffs make, execute and deliver to the said defendant a good and sufficient warranty deed conveying to him the said lands above described and that the said defendant be required to accept the said deed and make the said payment of the remaining part of the said purchase price, to-wit: $975.00, on or before a day certain to be fixed by the Court to be not more than fifteen days after making of the said decree and that in case the said defendant fail or refuse to so take said deed and make the said payment within the time fixed by the Court that the said contract be declared forfeited and plaintiffs released therefrom and for such other and further relief including costs of suit as may seem just and proper to the Court.

H. H. McCLUER,
Solicitor for plaintiffs.

Charles Stanley of lawful age being duly sworn on his oath says that he is one of the above named plaintiffs and that this affidavit is made on behalf of all of the plaintiffs and that he believes the facts as above set forth to be true.

CHARLES STANLEY.

Subscribed and sworn to before me this 12th day of February, 1898.

(L. S.)

W. E. STICE,
Notary Public.

Commission expires 12-14-1901.

20 Exhibit C.

United States, Indian Territory,
Northern Judicial District.

In the United States Court in said District.

Held at Wagoner.

Charles Stanley for Mary Bigknife, and Charles Stanley, Orillo Keno Mohawk and her husband, John Mohawk, Plaintiffs,

vs.

John E. Rundell, Defendant.

Answer.

Now comes John E. Rundell above named defendant in the above entitled cause, and for his answer herein admits each

and every allegation in plaintiffs' petition contained, except that he denies that the said plaintiffs Charles Stanley Mary Bigknife and Orillo Keno Mohawk was at the time of filing plaintiffs' petition, or are now the sole heirs at law of the said Willie Wea, and denies that they were the heirs of the said William Wea at all, and also denies that the said plaintiffs had at the time of filing said petition and that they or any one for them have the right to sell and convey the land described in the said petition:

Wherefore the said defendant John E. Rundell asks to be discharged from any obligation to accept said deed referred to in plaintiffs' petition, and hereby asks the court to discharge him from and relieve him of any liability under the contract referred to in said petition and for judgment for costs of this suit.

(Signed) JOHN E. RUNDELL.

Endorsed: In the Circuit Court of the United States, Eastern District of Okla. United States of America, Complainant, vs. John E. Rundell, et al., Defendants. Bill of Complaint. Filed Sept. 8/08. L. G. Disney, Clerk. By Florence Hammersley, D. C. Charles J. Bonaparte, Attorney General of United States.

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21 And thereafter on the 29th day of January, 1909, the defendants Miami Investment Co., and George E. Bowling, by their solicitors Halbert H. McCluer filed their appearance herein. Said appearance being in words and figures as follows:

22 In the Circuit Court of the United States for the Eastern District of Oklahoma.

United States,
No. 575. vs. Eq—
John E. Rundell et al.,

Now comes the Defendant, Miami Investment Co., and George E. Bowling, by Halbert H. McCluer, solicitors, and enter its and his appearance in the suit; and to the complainants bill of complaint herein.

To the Clerk of said Court:

Enter the above in the Order Book in Equity of said Court.

HALBERT H. McCLUER,
Solicitor for Defendant.

No. 575. United States, vs. John E. Rundell et al., Appearance of Miami Investment Co. Filed January, 29, 1909.

L. G. Disney, Clerk of the United States Circuit Court Eastern District Oklahoma.

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23 And thereafter on the 27th day of February 1909, the Miami Investment Co., and George E. Bowling filed their demurrer herein.

Said demurrer is in words and figures as follows:

24 In the Circuit Court of the United States for the Eastern District of Oklahoma.

United States of America, Complainant,
No. 575. vs. In Equity.
John E. Rundell, et al., Defendants.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Oklahoma:

The demurrer of the Miami Investment Company, a corporation, and George E. Bowling, two of the defendants in the above entitled cause to the bill of complaint of the United States of America, the complainant.

The above named defendants, by protestation, not confessing or acknowledging any or all of the matters and things in the complainants bill to be true in the manner and form therein set forth and alleged, enters this, their demurrer to the bill of Complainant, upon the following grounds.

1. That the complainant has no interest in the matters and things set out and alleged in said bill, and no right, title interest, or claim in or to the lands described therein, which would or does entitle it to maintain this suit as to such matters and things or as to said lands, or obtain the relief sought in relation thereto.

2. That, although the bill alleges as a conclusion of law that the Complainant is the guardian of the heirs of the person or persons to whom the land described in said bill were allotted, the Complainant is not in fact or in law the guardian of said persons, or any of them, and the said
25 conclusion of law is incorrect; and the Complainant has no right, authority, duty, or function, either in its own right, or as sovereign or guardian, which would or does entitle it to maintain said bill.

3. That it does not appear from the bill that the Complainant or the Peoria tribe or Nation of Indians, or the heirs of the allottees to whom it is alleged the land described in

the bill was allotted, or any of them, or any person of Indian blood, has any right, title, or interest in, or claim to, the said lands, or any thereof, or any interest in the matters and things in said bill set forth and alleged.

4. That it does not appear that any of the heirs of the allottees named in said bill, have requested the Complainant to exhibit said bill against this defendant.

5. That the complainant has not in and by said bill made and stated any such case as to entitle it to such discovery or relief as therein sought and prayed against this defendant.

6. That,—on the theory that the bill is exhibited against the several defendants by the Complainant as the authorized representative of, and for the sole benefit and interest of the heirs of the individuals to whom the several tracts of land therein described were allotted, and not in the interest of, or for the benefit of, the Complainant,—it does not appear from said bill that any one of said tracts of land, or any of the distinct matters and things in controversy, is of the value of Two Thousand Dollars; nor does it appear that all of said tracts, or matters and things in controversy, are of said value; nor does it appear that there is any diversity of citizenship between the said individuals, for whose benefit the suit is brought, or any of them, and these defendants; and this Court therefore has no jurisdiction of the bill, or any part thereof.

26 Wherefore, and for divers other causes of demurrer appearing in said bill, these defendants demurs thereto, and humbly demand the judgment of this Court whether they shall be compelled to make any further or other answer to said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

HALBERT H. McCLUER,
Solicitor for defendant.
For George E. Bowling and
Miami Investment Company.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HALBERT H. McCLUER,
Of counsel for defendants,
Bowling and Miami Investment Co.

State of Missouri,
County of Jackson—ss.

George E. Bowling being first duly sworn on oath says that he is one of the above named parties and is the Secretary

and Treasurer of the Miami Investment Company, another one of the above defendants and authorized to make this affidavit for and in its behalf and that the foregoing demurrer is not interposed for delay.

GEO. E. BOWLING.

Subscribed and sworn to before me this the 8th day of February, A. D. 1909.

(Seal) WILLIAM B. YUDER,
Notary Public.

My commission expires the 25 day of May, 1911.

27 575. Equity. United States of America, Complainant, vs. John E. Rundell, et al., Defendants. Demurrer of George E. Bowling and Miami Investment Company. Filed February, 27, 1909. L. G. Disney, Clerk U. S. Court, Eastern District, Oklahoma. Halbert H. McCluer, Atty. for Bowling and Miami Investment Co.

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28 And thereafter on the 4th day of March 1909, the complainant filed notice to the Clerk to set the demurrer of the Miami Investment Co., and George E. Bowling for hearing on the Order book, and in accordance with said notice the Clerk duly entered the said demurrer for hearing in the Order Book.

Said Notice to set for hearing is in words and figures as follows:

29 In the Circuit Court of the United States for the Eastern District of Oklahoma.

United States of America, Complainant,
No. 575. vs. Equity.
John E. Rundell, et al., Defendants.

To the Honorable L. G. Disney, Clerk of the above entitled court.

You will please enter upon the order book of your office and set down for hearing on the issues of law presented thereby, the demurrer of the defendants, the Miami Investment Company, a corporation, and George E. Bowling, filed in the above entitled cause on the 27th day of February, 1909, said demurrer to be considered and heard by the court on the rule day in April or as soon thereafter as the same can be heard by the court, and that you cause notice of the setting

down of said demurrer or hearing to be served upon the defendants or their attorney of record.

WM. J. GREGG,
United States Attorney
Solicitor for Complainant.

No. 575. In United States Circuit Court, Eastern District Oklahoma. United States, vs. John E. Rundell, et al., Application for Setting Down Demurrer for Argument. Filed Mar. 4, 1909. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla.

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30 And thereafter on the 15th day of May, A. D. 1909, the same being one of the days of the regular Tulsa, 1909 term of the United States Circuit Court for the Eastern District of Oklahoma, Court met pursuant to adjournment at Muskogee as of and for the Tulsa term thereof. Present and presiding the Honorable Ralph E. Campbell, Judge.

United States
No. 575. vs. Equity.
John E. Rundell, et al.,

Comes on for hearing the demurrer heretofore filed herein, which is, after argument of counsel, submitted to the Court, and by the Court taken under advisement, and defendant is given 15 days to file reply brief to plaintiff's brief, copy to be served upon plaintiff's Attorney, plaintiff to have 5 days thereafter to file suggestions in answer to defendants brief.

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31 And thereafter on the 12th day of September, 1910, the Court filed his opinion on the Demurrers to the Bill of Complainant, heretofore submitted herein.

Said opinion of the Court being in words and figures as follows:

32 In the Circuit Court of the United States for the Eastern District of Oklahoma.

United States of America, Complainant,
No. 575. vs. Equity.
John E. Rundell, et al., Defendants.

CAMPBELL, D. J.

This is a suit by bill in equity, instituted by the United States of America, against John E. Rundell, et al., seeking to have set aside certain conveyances, and to have decreed as invalid a certain judgment of the United States Court for the Northern District of Indian Territory, sitting at Wagoner, of

date May 19th, 1899. The land involved was originally the allotment of Pe-te-lon-o-zah, or William Wea, a member of the confederated Wea, Peoria, Kaskaskia and Piankeshaw tribes of Indians, being a portion of the lands formerly held in common by said tribes in what is now northeastern Oklahoma. By the patent from the United States to said allottee, dated April 8th, 1890, it was provided:

"That said lands shall not be alienated or subject to levy, sale, taxation, or forfeiture for a period of twenty-five years from the date hereof, and any contract or agreement to sell or convey said land before the expiration of said period, shall be absolutely null and void; to have and to hold the said land with the appurtenances thereunto belonging to the said Pe-te-lon-o-zah, or William Wea, and to his heirs, forever, with proviso as aforesaid."

33 It is alleged that the allottee, William Wea, died intestate in January, 1894, seized of said lands, and that thereafter the defendant, Rundell, procured certain persons, who claimed to be the heirs of said allottee, to execute deeds to him for said land, and that he also fraudulently caused to be instituted in the said United States Court for the Northern District of Indian Territory, a certain action, wherein said purported heirs were plaintiffs and the said Rundell was defendant, and fraudulently procured a judgment to be rendered by said court, adjudging and decreeing the validity of a certain contract on the part of said heirs, to convey said land to the defendant, Rundell, and such conveyance and those subsequently made by defendant, Rundell, and his grantees, and the judgment of said court it is now sought to have set aside by this proceeding.

To the bill the defendants, the Miami Investment Company, and George E. Bowling, have demurred. By the demurrer it is urged that complainant has no interest in the matters and things alleged in the bill and no right, title, interest, or claim in or to the lands described therein entitling it to maintain this suit or obtain the relief sought; that complainant is in no sense guardian of said allottee or his heirs, and has no right, authority, duty, or function, either in its own right or as sovereign or guardian, entitling it to maintain the suit; that it does not appear that the complainant or the tribe or the heirs of the said allottee, or any person of Indian blood, has any right, title or interest in or claim to said land or in the matters and things set forth in the bill; that it does
34 not appear that the heirs of the said allottee ever requested the complainant to bring the suit; and that less than the jurisdictional amount is involved.

Since the argument and submission of this case upon the demurrer, the United States Court of Appeals for this circuit has rendered its decision in the case of United States vs. Allen, et al., 179 Fed. 13. In that case, as in this case, the United States have brought suit in their own name, without joining the allottees, to cancel and set aside certain alleged unlawful conveyances of restricted Indian allotments of members of the Five Civilized Tribes. The point was there made by the defendants that the United States, having divested itself of every vestige of the title to such allotments, not even holding the legal title in trust, as in the case of allotments made under the general allotment act of 1887, they had no such interest in the suits as entitled them to maintain the actions. The court said:

"The Supreme Court of the United States in the case which carried the emancipation of the Indians and their property to the fullest extent, expressly recognizes the right of the government to enforce, by appropriate action in court, the restraints which it imposed upon the alienation of Indian allotments. The court says in the Heff case, 197 U. S., 489, 509: 'Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a National or state court. * * * Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands; and the proper tribunal may at the instance of the rightful party enforce all restraints upon alienation.' Under the general allotment act of 1887, a provisional patent was issued to the allottee, and the naked legal title retained in the government for the period of twenty-five years. In the case of the five civilized tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same, namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with such a restriction as would prevent the main reliance of the government for the industrial betterment of the Indian from being defeated by the alienation of the property. The right of the government to invoke the aid of its court to prevent the defeat of its object is the same under the one statute as the other. Its right to maintain a suit to prevent the defeat of its allotment scheme under the general law of 1887, is fully sustained in United States v. Rickert, 188

U. S., 432. It is contended, however, in the present case, that that decision is not controlling because there the government held the legal title to the property for a period of 25 years in trust for the Indian, but subject to a restraint upon alienation, whereas here the legal title has been conveyed to the Indian. The decision in the Rickert case does not rest upon a principle of the law of real property but upon the power of the nation to enforce its own measures. At page 444 of the opinion the right of the government to maintain the suit is declared to rest, not upon the fact that it held the title to the property, but, to use the language of the court, upon 'the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians.' In either case it is not a right of property which is enforced, but a plan of government. The Supreme Court there declares the right of the nation to maintain a suit for the enforcement of its policy in regard to Indian allotments to be too plain for argument. 188 U. S., 444. This statement is approved in McKay v. Kalyton, 204 U. S., 458, 467."

If in the case of the Five Civilized Tribes, the mere placing of restrictions by the government upon the allotments expressed a governmental policy, which the United States, in their own name without joining the allottees, can enforce in this court, then, in my judgment, the same result must follow the placing of the twenty-five years restriction against alienation under which the allottee in this case took his allotment.

Does the restriction period of twenty-five years run with the land or is it personal to the allottee, and does that cease with his death? The language of the act is:

36 "The lands so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years." (25 Stat. 1013.)

As we have seen, this provision is incorporated into the patent. In the case of the Quapaw Indians, a neighboring tribe, the Act of Congress providing for the allotment in severalty of their lands (28 Stat. 907), authorized the Secretary of the Interior to issue patents to the allottees in accordance with the provisions of the act, with the proviso that such allotments should be inalienable for a period of twenty-five years from and after the date of such patents. The patents issued pursuant to this act read that the United States—

"does give and grant unto the said (patentee), and to (his or her) heirs, the said tract above described, but with the stipu-

lation and limitation, contained in the aforesaid act, that the land embraced in this patent shall be inalienable for the period of twenty-five years from and after the date hereof, to have and to hold the same, together with all the rights, privileges, and immunities and appurtenances of whatsoever nature thereunto belonging, unto the said (patentee), and to (his or her) heirs, forever, provided as aforesaid that said tract shall be inalienable for the said period of twenty-five years."

In the case of Goodrum vs. Buffalo, 162 Fed. 817, decided by the Circuit Court of Appeals for this circuit, the court say:

"The language of the statute under which the patent was issued to John Medicine is 'that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents.' It is a limitation attached to and running with the land, in no wise dependent upon the life or death of the patentee. It was as much within the policy and purpose of the government to see that the heirs of the allottee in case of his death, were protected against alienation of the land, as the allottee himself; otherwise, they might become
a charge upon the public, and the beneficent policy of
37 the government in bringing about the allotment of lands in severalty would be thwarted."

The terms of the two acts, so far as they imposed restriction upon alienation are essentially similar, and I can conceive of no such difference in the character of holding by the Quapaw allottee and that of the allottee in this case as would make this any less a restriction running with the land than that of the Quapaw. If, then, the United States might, during the life of the allottee, come into this court for the purpose of enforcing the restriction against alienation and to set aside a conveyenace made in violation thereof, without joining the allottee, they may also maintain such action after the death of the allottee, without joining his heirs, at any time during the continuance of the twenty-five year restriction period, in a case where the heirs have attempted to convey in violation of such restriction. Nor can the judgment of the United States Court for the Indian Territory, involved in this case, be said to be of any more binding effect to overcome the restriction provision than can the judgment of the United States Court for the Indian Territory, involved in the case of Goodrum v. Buffalo.

In the light of the two controlling decisions of the Circuit Court of Appeals for this circuit, heretofore cited, the demurrer must be overruled. It is so ordered.

RALPH E. CAMPBELL,
Judge.

38 Endorsed: No. 575. United States vs. John E. Rundell, et al. Memo. of opinion overruling Demurrers. Filed In open Court. Sep. 12, 1910. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla.

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39 And thereafter on the 29th day of October, A. D. 1910, the same being one of the days of the regular Ardmore 1909 term, of the United States Circuit Court for the Eastern District of Oklahoma, Court met pursuant to adjournment at Muskogee as and for the Ardmore term thereof. Present and presiding the Honorable Ralph E. Campbell, Judge.

Among the proceedings had on this day were the following to-wit:

40 In the Circuit Court of the United States for the Eastern District of Oklahoma.

The United States of America, Complainant,
No. 575. vs. In Equity.
John E. Rundell, and Florence Rundell, his wife, George E. Bowling and Jennie Bowling, his wife; Bartlett Cooley and Kate J. Cooley, his wife; Eugene Albright and Kate Albright, his wife; Miami Investment Company, a corporation; Charles E. Swan and Mildred Swan, his wife; W. H. Grant and Sadie Grant, his wife; Hi Fee and Mary M. Fee, his wife; Barton County Building and Loan Association, a corporation; J. F. Robinson; W. L. McWilliams; Mary Buck and .... Buck, her husband; Charles Stanley; Orillo Keno Mohawk and John Mohawk, her husband; Mary Bigknife; and W. I. Bingham, J. E. Supernaw and J. K. Stephens, County Commissioners of Ottawa County, Oklahoma, Defendants.

Order Overruling Demurrers of Defendants George E. Bowling and the Miami Investment Company.

On this 29th day of October, 1910, on consideration of the demurrers to this bill filed by defendants, George E. Bowling and the Miami Investment Company, which were heretofore argued, submitted, and by the Court taken under advisement, the matter having been fully considered and understood, it is by the Court ordered that the demurrers of said defendants George E. Bowling and the Miami Investment Company should each be, and are hereby overruled at the costs of the said defendants, and the said defendants, George E. Bowling and the Miami Investment Company each for themselves except to the action of the Court in overruling their demurrers to the complaint; and the said defendants, George E. Bowling and

the Miami Investment Company are given until the rule day in November to further plead in this cause.

RALPH E. CAMPBELL,
Judge.

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41 And thereafter, to-wit, on the 9th day of November, 1910, the Defendants, Miami Investment Co. and George E. Bowling filed their answer herein.

Said Answer is in words and figures as follows:

42 In the Circuit Court of the United States for the Eastern District of Oklahoma.

The United States of America, Complainant,
No. 575. vs. In Equity.

John E. Rundell, and Florence Rundell, his wife; George E. Bowling, and Jennie Bowling, his wife; Bartlett Cooley and Kate J. Cooley, his wife; Eugene Albright and Kate Albright, his wife; Miami Investment Company, a corporation; Charles E. Swan and Mildred E. Swan, his wife; W. H. Grant and Sadie Grant, his wife; Hi Fee and Mary M. Fee, his wife; Barton County Building and Loan Association, a corporation; J. F. Robinson, W. L. McWilliams; Mary Buck and ..... Buck, her husband; Charles Stanley; Orillo Keno Mohawk and John Mohawk, her husband; Mary Bigknife and W. I. Bingham, J. F. Supernaw, and J. K. Stephens, County Commissioners of Ottawa County, Oklahoma, Defendants.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Oklahoma, in Equity:

Separate answer of the defendants Miami Investment Company, and George E. Bowling.

Now at this day comes the Miami Investment Company, a corporation organized and existing under and by virtue of the laws of the United States in force in the Indian Territory at the time of the organization of said Company, and now existing under the laws of the State of Oklahoma; and George E. Bowling, a citizen of the State of Missouri, residing in Jackson County, in said State, defendants in the above entitled cause; and for their separate answer herein admit, deny and allege as follows, to-wit:

43 These defendants admit that the defendants W. L. McWilliams, J. F. Robinson, Mary Buck, Charles Stanley, Orillo Keno Mohawk, and John Mohawk, W. I. Bingham,

J. E. Supernaw and J. K. Stephens, are each and all residents and citizens of the State of Oklahoma, residing in the Eastern judicial District thereof, and that the said W. I. Bingham and J. E. Supernaw and J. K. Stephens, at the time of the filing of the bill herein, were the County Commissioners of Ottawa County, Oklahoma.

These defendants, further answering, say that they do not know the residences of the defendants, Charles E. Swan, Mildred E. Swan, W. H. Grant, Sadie Grant, Hi Fee, and Mary M. Fee.

These defendants, further answering, say that ..... Buck, the husband of Mary Buck, departed this life prior to the filing of the bill in this case, and that the defendant Mary Buck, has since said date intermarried with one ..... Daugherty, whose first name is to these defendants unknown.

These defendants, further answering, admit that the defendant, Jennie Bowling, is the wife of the defendant George E. Bowling, and is a citizen of the State of Missouri, residing in Jackson County, in said State; and they admit that the Barton County Building and Loan Association was a corporation organized and existing under the laws of the State of Missouri, having for its principal office the town of Lamar, Barton County, Missouri; and allege that prior to the filing of the bill said corporation was duly dissolved and ceased doing business as such. Defendants admit that the defendant, Bartlett Cooley is a resident and citizen of the State of Kansas, residing in Galena, Cherokee County, in said State; and state that Kate J. Cooley, the wife of Bartlett Cooley, departed this life prior to the filing of the bill; and allege that John E. Rundell departed this life prior to the filing of the bill in this case; and further answering deny that Florence
44 Rundell is a resident of the state of Kansas, residing at Galena, Cherokee County, in said State; and allege that said Florence Rundell is a citizen of the State of Oklahoma, residing at Sapulpa in said State.

These defendants, further answering, admit that the defendants Eugene Albright, and Kate Albright, his wife, are residents and citizens of the State of Illinois, residing in the City of Chicago, in said State. And these defendants state that the residences of the parties as set forth above was the same at the filing of the bill [of the bill] in this case as they are at this time.

II.

These defendants answering the first paragraph of the bill in this case say that they deny that in granting lands to the

Indian tribes and members thereof, especially the confederated Wea, Peoria, Kaskaskia and Piankeshaw tribes of Indians, it became and was the policy of the United States government to grant such lands only upon such terms, conditions and limitations as would insure to the grantees the retention and conservation of the lands so granted; and these defendants deny that because of the weak, helpless and dependent character of the Indian people it also became and was and is the policy of the Government in making such grants to the Indian tribes and the members thereof to guarantee and promise to secure to the grantees, their heirs and successors the exclusive possession and full enjoyment of the lands so granted.

III.

These defendants answering the second paragraph of the bill in this case say that they deny that the United States Government has always, and now does assume the relation of guardian over the Indian tribes and the members thereof;
45 and deny that its political department has always declared and now declares such relation to exist.

These defendants further answering said paragraph say that they deny that the bill in this case was filed on behalf of certain members of the confederated Wea, Peoria, Kaskaskia and Piankeshaw Tribes of Indians; and deny that the bill was filed on behalf of the unknown heirs of William Wea, deceased; and deny that it was brought at the request or by the consent of any of the heirs of William Wea, deceased; and deny that it was brought on the behalf of the Government or by any right or authority whatsoever.

IV.

These defendants answering the third paragraph of the bill in this case, say that they admit that by an Act of Congress approved March 2, 1899, entitled "An Act to provide for allotment of land in severalty to the United Peoria and Miamies in Indian Territory, and for other purposes," (25 Stats. 1013), the Secretary of the Interior was authorized and directed to allot in severalty to the members of the said confederated Wea, Kaskaskia and Piankeshaw Tribes of Indians a certain quantity of land within the limits of the reservation theretofore granted to the said Confederated Tribes of Indians for their use and occupancy; but deny that the same was to be allotted upon the guarantees mentioned and set forth in the first paragraph of the bill of complainant filed in this case.

These defendants further answering said paragraph admit that said lands were at the date of the passage of said Act

occupied by said Confederated Tribes of Indians; but deny that they have been so occupied ever since said date.

These defendants further answering said paragraph of the bill in this case, deny that the lands to be allotted in severalty were not to be subject to alienation for twenty-five
46 (25) years from the date of the issuance of the patent therefor; and they deny that the lands so allotted and patented were to be exempt from levy, sale, taxation or forfeiture for a like period of years; but they admit that the Secretary of the Interior was to cause a patent to issue to each and every person so entitled for his or her allotment, and that such patent was to recite in the body thereof a restriction upon alienation thereof, as provided by said Act, and that said patent should also recite the immunity from levy, sale, taxation and forfeiture as provided in said Act.

And these defendants further answering said paragraph say that they deny that any contract or agreement to sell or convey said lands or allotment so patented entered into before the expiration of said twenty-five (25) years from the date of said patent was to be null and void.

V.

These defendants answering the fourth paragraph of the bill heretofore filed in this cause, say that they admit that under and by virtue of the aforesaid Act of Congress and in accordance with the terms and provisions thereof, the said Pe-te-lon-o-zah, or William Wea, during his life time selected and had set apart to him, as his distributive share of the lands belonging to said tribe in the Indian Territory, the following described lands, to-wit:

The North half of the Northeast quarter and lots numbered Three and Four of Section 25, and Lot numbered One of Section 27, in Township 28 North, Range 22 East; and Lot numbered One and Two of Section 30, township 28 north, range 23 east of the Indian Meridian, containing in the aggregate 198.88 acres;

47 which said lands are located within the Eastern District of Oklahoma and within the jurisdiction of this Court. And further show that the said selection as the personal allotment of the said Pe-te-lon-o-zah, or William Wea, was duly approved by the Secretary of the Interior in accordance with the provisions of said Act of Congress; that afterwards and on, to-wit, the 8th day of April, 1890, there was duly issued to the said Pe-te-lon-o-zah, or William Wea, by the President of the United States, the Honorable Benjamin

Harrison, a patent for the above described lands, which patent conveyed said lands unto the said Pe-te-lon-o-zah, or William Wea, and his heirs, upon the terms, conditions, limitations and immunities of the Act of Congress.

VI.

These defendants answering the fifth paragraph of the bill in this case say that they admit that the said Pe-te-lon-o-zah, or William Wea, died intestate on or about the 23rd day of January, 1894, seized of the real estate above described, leaving as his heirs at law a number of persons. But they deny that said several heirs are entitled to take said land and estate and interest of the said Pe-te-lon-o-zah, or William Wea, therein by inheritance or otherwise.

VII.

These defendants answering the sixth paragraph of the bill heretofore filed in this case say that they deny that the defendant John E. Rundell, in violation and defiance of the provisions of said Act of Congress, unlawfully and inequitably, or in any other manner, induced certain persons, viz., Charles Stanley, Mary Bigknife and Orillo Keno Mohawk, to execute and deliver to the said John Rundell their deed purporting to convey to him the lands above described; but admit that the said John Rundell did receive a deed from said parties, who at said time claimed and represented themselves to be the heirs at law of the said William Wea, and that said deed was received upon the consideration and in the manner and under circumstances as fully set forth hereinafter in this answer.

These defendants further answering said paragraph say that they admit that on the 31st day of May, 1899, that said John Rundell and his wife, Florence Rundell, executed and delivered their quit claim deed, for the purported consideration of
48 One Thousand dollars ($1000.) to the defendant, George E. Bowling, that afterwards and on, to-wit, the 14th day of August, 1899, the said George E. Bowling and his wife, Jennie Bowling, executed and delivered to the said John E. Rundell, their quit claim deed to the premises hereinbefore described, for the purported consideration of One Dollar ($1.00); and that afterwards and on, to-wit, the 17th day of May, 1901, the defendants, John E. Rundell and his wife, Florence Rundell, executed and delivered to the defendant Bartlett Cooley, their quit claim deed to the premises hereinbefore described, for the purported consideration of One Thousand Six Hundred ($1600.); and that thereafter the defendants, George E. Bowling and Jennie Bowling his

wife, Bartlett Cooley and Kate J. Cooley, his wife, Eugene Albright and Kate Albright, his wife, executed and delivered to the defendant, Miami Investment Company, a corporation, their quit claim deed, under date of September 6, 1901, conveying to the said corporation the lands hereinbefore described, for a purported consideration of Seven Thousand Five Hundred Dollars ($7500.). That thereafter and on, to-wit, the 19th day of November, 1901, the said defendant, Miami Investment Company, a corporation, caused a part of the land hereinbefore described to be conveyed into lots and blocks, streets and alleys, and platted into an addition to the town of Miami, known and designated as the Miami Investment Company's First Addition to Miami, Indian Territory, and caused said plat, together with the dedication thereof and of the streets and alleys in said plat, to public use, to be filed for record on the 30th day of November, 1901, in the office of the Clerk of the United States Court at Miami, Indian Territory.

But these defendants deny that said purported dedication of the streets and alleys by said Miami Investment Company to the use of the public was an unlawful and unequit-
49 able invasion of the rights of the complainant, or of the heirs of the said William Wea in said land; and deny that it was wholly unauthorized in law or equity.

These defendants further answering said paragraph say that afterwards and on, to-wit on the 26th day of November, 1901, the Miami Investment Company sold and conveyed Lot Sixteen in Block One of the Miami Investment Company's First Addition to the town of Miami, to the defendant, Charles E. Swan, who afterwards executed a mortgage on said Lot to the defendant, Barton County Building and Loan Association, a corporation, to secure the payment of the sum of two hundred dollars ($200.); that afterwards and on, to-wit the 25th day of April, 1902, the defendant, Miami Investment Company, a corporation, conveyed to the defendant, W. H. Grant, Lot 9, Block Six, in said Addition, and that afterwards and on, to-wit, the 6th day of June, 1902, the said W. H. Grant, and wife executed to the defendants, George E. Bowling and Eugene Albright, a mortgage on said Lot to secure the payment of the sum of Three Hundred Dollars, ($300.00); that afterwards and on, to-wit, the 29th day of September, 1902, the defendants Charles E. Swan and Mildred E. Swan, his wife, sold and conveyed said Lot sixteen in Block One of said Addition to the defendants Hi Fee and Mary M. Fee, his wife, subject to the mortgage thereon to the defendant, Barton County Building and Loan Association.

VIII.

These defendants answering the seventh paragraph of the bill say that they deny that all or any one of the written instrument referred to in said paragraph were or are void in law or in fact.

IX.

These defendants answering the eighth paragraph of
50 the bill say they admit that all instruments referred to in said paragraph have been duly filed and recorded; but deny that all or any of said instruments were taken in violation or defiance of the provisions of law, and deny that all or any one of said instruments are void or illegal or ineffectual to convey title; but allege that each and all of said instrument are valid conveyances, transferring and conveying the interest in said land which they purported to convey.

X.

These defendants answering the ninth paragraph of the bill say that they admit each and all of the allegations in said paragraph as therein set forth.

XI.

The defendants answering the tenth paragraph of the bill deny that the action mentioned in the ninth paragraph and referred to in the tenth paragraph of the bill heretofore filed and the pleadings filed in said case, were a part of a fraudulent scheme entered into by the defendant, John E. Rundell, and deny that the said John E. Rundell entered into any fraudulent scheme whatever in relation thereto, and deny that said suit was intended to secure under color of a decree of court a title to the land described in the bill of complaint; and deny that the same was for the purpose of circumventing and evading the provisions of the Act of Congress under which the lands were allotted; and deny that same was an attempt to violate the terms and conditions of the patent issued to the allottees.

These defendants further answering said paragraph say that they deny that said action was not a real and substantial controversy between the parties thereto; and deny that the defendant, John E. Rundell, paid or employed an attorney who represented the plaintiffs in said suit; and deny that said attorney was a representative of the said John E.
51 Rundell; and deny that the judgment procured in said action was procured by reason of the fraud and deception between the parties thereto practiced upon the court.

These defendants further answering said paragraph, deny that at said time the Secretary of the Interior had the direct management, control or supervision of the lands of the allottees of the Peoria-Miami band of Indians in the Indian Territory; and deny that the said Secretary at said time had the management, control or supervision of the lands in controversy herein.

XII.

The defendants answering the eleventh paragraph of the bill heretofore filed in this case, say that they deny that the United States Court for the Northern District of the Indian Territory, sitting at Wagoner, was without jurisdiction of the subject matter of the said suit heretofore mentioned; and deny that the court was without jurisdiction to render a decree binding the plaintiffs or their right, title estate or interest in any lands belonging to them; and deny that said plaintiffs, Charles Stanley, Mary Bigknife and Orillo Keno Mohawk, were without legal capacity to sue or maintain such action; and deny that said court was without jurisdiction to render any judgment or decree therein which would be binding upon them or effect the title, right and interest of the United States in said land; and deny that the United States, as trustee, had any interest in said land.

And these defendants further answering said paragraph deny that the judgment rendered in said case was void; and deny that any of the acts or proceedings in the same were unlawful or were against equity and good conscience, or that same tended to manifest wrong and injury to the complainant, or to the heirs of William Wea, deceased.

XIII.

52 These defendants answering the twelfth paragraph of the bill of complaint herein filed, say that they deny that the acts of these defendant, or of those parties under whom they claim, were in violation and defiance and evasion of the laws of the United States, or of the will of Congress or in violation of the duty owing by the complainant to the Indians and deny that any of the acts of these defendants or of those under whom they claim were prejudicial to the control or government of said Indian tribes, or the members thereof; and deny that it is the duty of said complainant, by reason of its guaranties to protect the Indians in the enjoyment and possession of the land granted to them under the Act of Congress authorizing the allotment of lands to the United Peorias and Miamis; and deny that the complainant has any

guardianship over the members of said tribes, or the individual members thereof, or the right to bring this bill.

XIV.

These defendants further answering the bill of complaint in this case say there is a misjoinder of parties defendant, in this, that the heirs or legal representatives of John E. Rundell, deceased, are not made parties hereto.

XV.

These defendants, further answering said bill of complaint, say that there is no equity in the said bill, and that a full, adequate and complete remedy at law exists, if any cause of action exists whatever.

XVI.

These defendants, further answering the bill, allege that the lands mentioned in the bill of complaint filed in this case were allotted to one Pe-te-lon-o-zah, or William Wea, under and by virtue of the provisions on an Act of Congress entitled, "An Act to provide for allotment of lands in severalty to the United Peoria and Miami Indians in Indian
53 Territory, and for other purposes". Passed and approved March 2, 1899, and that said allotment was made strictly in accordance with the provisions of said Act; that subsequently to the receiving of the said allotment, the said William Wea departed this life intestate, and that at the time of his death, left surviving him as his sole and only heirs his cousins Charles Stanley, Orillo Keno Mohawk, and Mary Bigknife, to whom said lands descended upon his death.

These defendants, further answering, state that on May 2, 1890, by a special Act of Congress (26 Statutes at large, pp. 99) the members of the united Peoria and Miami Indians were expressly declared to be citizens of the United States, and were granted all the rights privileges and immunities as such, and that at said date the guardianship, if any guardianship ever existed on behalf of the United States over said tribes of Indians and the individual members thereof, ceased and terminated, and the individual members of said tribes became and were citizens of the United States, possessed of all rights and power as such, and ceased to be special favorites of the law.

These defendants further answering say that on the second day of December, 1897, the above mentioned Charles Stanley, Mary Bigknife, under the name of Molly Bigknife, and Orillo

Keno Mohawk, under the name of Orillo Keno, entered into a contract in writing with one John E. Rundell, by the terms of which the said parties agreed to convey to the said John E. Rundell the lands mentioned in the bill of complaint, for a consideration of One thousand dollars, ($1000). Twenty-five dollars ($25.00) of which, as shown by said contract was paid in cash, and the balance to be paid when the said parties had established their rights to said land and a right
54 to convey the same and make and deliver a good and sufficient warranty deed unto the said John E. Rundell; that subsequently thereto the said Charles Stanley, Mary Bigknife, and Orillo Keno Mohawk, instituted a suit in equity in the United States court for the Northern District of the Indian Territory sitting at Wagoner in said District against the said John E. Rundell, praying in the said suit for a specific performance of their contract of sale as above set forth, and that said suit was commenced on March 2, 1898.

These defendants further answering that the plaintiffs and the defendants in the said suit were at the time of filing the same all citizens of the United States, and were all residing in the Northern District of the Indian Territory, and that the land involved in the said suit was situated in the said District, and that said United States court had jurisdiction of the persons and of the subject matter of the said suit, and of the right to decide and to determine the issues involved therein; that said suit was brought in good faith and so prosecuted for the purpose of determining the rights of the respective parties to said contract. That in said suit there was tendered to the said John E. Rundell a deed duly executed by said parties conveying to the said John E. Rundell the said lands and tendered in said suit as full compliance by the plaintiffs of their part of said contract. That a hearing in said cause resulted in a finding and judgment in favor of the plaintiffs, wherein it was adjudged and decreed that the contract entered into between said plaintiffs and the said defendant was a good, valid and subsisting contract, and that the deed tendered to the defendant conveyed to him a legal title to the said land, and directing that the same be delivered to him as a full compliance upon the part of said plaintiffs, and of their part of said contract, and ordered and adjudged that the said plaintiffs
55 have and recover from the said John E. Rundell the sum of $975.00 and costs of suit as the payment in full of said premises; and that afterwards the said John E. Rundell satisfied the said judgment in full by paying to the parties entitled thereto the said sum of $975.00 with interest thereon to the date of payment, together with all costs of the

suit, and accepted said deed and placed the same upon the records.

And these defendants further answering say that said deed conveyed to the said John E. Rundell good and valid title in fee simple to said lands. And these defendants further answering say the decisions of the said Court as to the validity of said title so acquired by the said John E. Rundell became and was res judicata, and as such is set up in this answer as a defense thereto.

XVII.

These defendants further answering the bill of complaint, say that they deny each and all of the allegations in the bill of complaint herein filed which have not been herein specifically admitted.

These defendants having fully answered ask that they may be discharged with their costs herein laid out and expended.

H. H. McCLUER,
ROLAND HUGHES,
Solicitors for the defendants, Miami Investment Company and George E. Bowling.

56 No. 575. In the Circuit Court of the United States for the Eastern District of Oklahoma. The United States of America, Complainant, vs. John E. Rundell, et al., Defendants. Answer. United States Circuit Court Eastern District Okla. Filed November 9, 1910. L. G. Disney, Clerk. H. H. McCluer, and Roland Hughes, Attorneys for The Miami Investment Company, and George E. Bowling.

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57 And thereafter on the 23 day of November, 1910, the Complainant filed notice to set cause down on order book for hearing on the Bill and Answer, and in accordance with said Notice said cause was duly entered in the order book for hearing on the Bill and Answer,

Said Notice is in words and figures as follows:

In the Circuit Court of the United States for the Eastern District of Oklahoma.

The United States of America, Plaintiff,
No. 575. vs. Equity.
John E. Rundell, Florence Rundell, his wife, George E. Bowling and Jennie Bowling, his wife, Bartlett Cooley and Kate J. Cooley, his wife, Eugene Albright and Kate Albright, his wife, Miami Investment Company a Cor-

poration, Chas. E. Swan, and Mildred Swan, his wife; Hi Fee, and Mary M. Fee, his wife, W. H. Grant and Sadie Grant, his wife, Barton County Building & Loan Association, a Corporation, J. F. Robinson, W. L. McWilliams, Mary Buck and ..... Buck, her husband, Charles Stanley, Orillo Keno Mohawk and John Mohawk, her husband, Mary Bigknife and W. L. Bingham, J. E. Supernaw and J. K. Stephens, County Commissioners and Ottawa County, Oklahoma, Defendants.

To the Clerk of the Circuit Court of the United States in and for the Eastern District of Oklahoma:

You will please set down the above case for hearing on bill and answer to be heard on the 2nd day of January, 1911, the same being the first Rule Day of the Regular term of the United States Circuit Court in and for the Eastern
58 District of Oklahoma, sitting at Muskogee, and also the Rule Day of the Month of January, 1911, or as soon thereafter as practical.

P. A. EWERT,
Special Assistant to the Attorney General of the United States and Solicitor for the Complainant.

Endorsed: Equity No. 575. United States of America, Complainant, vs. John E. Rundell, et al. United States Circuit Court Eastern Dist. Okla. Filed Nov. 2, 1910. L. G. Disney, Clerk. Praecipe to set down for hearing.

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59 And thereafter on the 4th day of January, A. D. 1911, the same being one of the days of the regular January 1911 term of the United States Circuit Court for the Eastern District of Oklahoma, Court met pursuant to adjournment. Present and presiding the Honorable Ralph E. Campbell, Judge.

Among the proceedings had on this day, is the following, to-wit:

In the United States Circuit Court for the Eastern District of Oklahoma.

United States, Complainant,
No. 575. vs. Equity.
John E. Rundell, et al., Defendant.

Order.

This cause comes on regularly for hearing on the bill and answer herein, which is, after argument of counsel, submitted to the Court, and by the Court taken under advisement, and

defendant is given 20 days in which to prepare and file brief in support of their answer, a copy of said brief to be served upon the counsel for the Complainant. Complainant is given 10 days after service in which to prepare and file its brief in reply.

RALPH E. CAMPBELL,
Judge.

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60 And thereafter on the 21st day of February, A. D. 1911, the same being one of the days of the regular January 1911 term of this court at Muskogee, Court met pursuant to adjournment. Present and presiding the Honorable Ralph E. Campbell, Judge.

Among the proceedings had on this day is the following, to-wit:

In the Circuit Court of the United States for the Eastern District of Oklahoma.

United States of America, Complainant,
No. 575. vs. In Equity.
John E. Rundell, George E. Bowling, Miami Investment Company, et al., Defendants.

Decree on Bill and Answer of Defendants, George E. Bowling and Miami Investment Company.

This cause came on to be heard on the 4th day of January, 1911, being an adjourned day of the Rule day in the month of January, and a day of the regular term of the United States Circuit Court in and for the Eastern District of Oklahoma, upon Complainant's Bill of Complaint herein and the Answer of the defendants, George E. Bowling and The Miami Investment Company, and it appearing to the Court that the United States of America is a proper [part] complainant in this action, that there is equity in the Bill and that the Complainant is entitled to the relief against the said defendants, George E. Bowling, and The Miami Investment Company, asked for in the Bill of Complaint,

Now, Therefore, It is Ordered, Adjudged and Decreed that the certain deed made by Charles Stanley, Mollie Big-
61 knife and Orillo Keno to John E. Rundell under date of December 2nd, 1897, as alleged in paragraph VI. of the Bill of Complaint, wherein and whereby the said persons, purporting to be the lawful heirs of the said Pe-te-lon-o-zah, or William Wea, did bargain, sell and convey unto one John E. Rundell, the following described lands, to-wit:

The North half of the northeast quarter and Lots Three and Four of Section Twenty-five, Township Twenty-eight, Range Twenty-two, Northwest Quarter of the Northwest Quarter, and Lots One and Two of Section Thirty, Township Twenty-eight, Range Twenty-three Lot number One of the Northwest Quarter of Section Twenty-seven, Township Twenty-eight, Range Twenty-two, on Peoria Reserve, Indian Territory,—

was made contrary to and in express violation of the provisions contained in the Act of Congress approved March 2, 1889, (25 Statutes at Large, page 1014), under which the said lands were allotted to the said Pe-te-lon-o-zah, or William Wea, providing that the said allotted lands should not be alienated for twenty five years from the date of the patent, and that any contract or agreement to sell or convey the same before the expiration of the period of inalienability should be absolutely null and void, and conveyed to the said John E. Rundell no title whatsoever in and to the said lands; for which reasons that certain quit-claim deed made and executed by John E. Rundell and Florence Rundell, his wife, under date of May 31, 1899, as alleged in paragraph VI of the Bill of Complaint, wherein and whereby the said John E. Rundell and Florence Rundell, his wife, quit-claimed to the defendant, George E. Bowling, all their right, title and interest in and to the following described lands, to-wit:

The North Half of the Northeast quarter and Lots three and Four of Section Twenty-five, Township Twenty-eight, Range Twenty-two; Lot number One in Section Twenty-seven, Township Twenty-eight, Range Twenty-two, Lots number One and two in Section Thirty, Township Twenty-eight, Range Twenty-three, Quapaw Agency, Indian Territory.

62 conveyed no title to the grantee and is decreed to be null and void and ordered cancelled of record as a cloud upon the title of the lawful heirs of William Wea in and to said lands; for like reasons the certain quit claim deed made, executed and delivered by that grantee, George E. Bowling, and Jennie Bowling, his wife to John E. Rundell under date of August 14, 1899, as alleged in paragraph VI of the Bill of Complaint quit-claiming and conveying to the said John E. Rundell an undivided one-fifth interest in and to the said described lands, conveyed no title to the grantee, John E. Rundell, for which reasons the quit-claim deed made, executed and delivered by John E. Rundell and Florence Rundell, his wife, to the defendant, Bartlett Cooley, as alleged in paragraph VI of the Bill of Complaint, conveyed no title in and to the said lands to the said Bartlett Cooley, and therefore the certain quit claim deed made, executed and delivered by George

E. Bowling and Jennie Bowling, his wife, Bartlett Cooley and K. J. Cooley, his wife, and Eugene Albright and Kate Albright, his wife, to the Miami Investment Company under date of September 6, 1901, as alleged in paragraph VI of the Bill of Complaint quit-claiming and conveying to the said defendant, The Miami Investment Company all their right, title and interest in and to the lands hereinbefore described, conveyed no title in and to the said lands to the said Miami Investment Company, defendant, and the deed is decreed to be null and void and of no legal effect and is ordered cancelled of record as a cloud upon the title of the lawful heirs of the said Pe-te-lon-o-zah, or William Wea, in and to the said lands.

That the United States Court for the Northern District of Indian Territory, being itself a creature of Congress with limited jurisdiction, was not invested with jurisdiction to extend by a mere decretal order a power of alienation over the lands in question denied by the Act of Congress under
63 which Pe-te-lon-o-zah was allotted with lands, and therefore the judgment and decree of the said Court, rendered in the case of Charles Stanley, Mary Bigknife, Orillo Keno Mohawk and John Mohawk, her husband, plaintiffs, vs. John E. Rundell, defendant under date of May 19, 1899 as alleged in paragraph IX, X and XI of the Bill of Complaint, was ineffectual to convey any title of interest whatsoever in and to the hereinbefore mentioned lands to the said John E. Rundell, under and through whom the defendants, George E. Bowling and the Miami Investment Company claim title in and to the said lands, and the judgment was and is of no legal effect against the lawful heirs of the said Pe-te-lon-o-zah in so far as it attempts to provide for, or decree, the sale, alienation and transfer of the said lands, and, therefore, these defendants who respectively claim title to said lands through the defendant, John E. Rundell, and mesne Conveyances, acquired no interest, legal or equitable, in and to the said lands.

That the Complainant have judgment against the said defendants, George E. Bowling and The Miami Investment Company, for [courts] herein necessarily incurred together with the statutory docket fee, to be taxed by the Clerk without notice to parties.

Done in open court in the City of Muskogee in the State of Oklahoma on this 21 day of February, 1911, being a day of the regular term of the United States Circuit Court in

and for the Eastern District of Oklahoma, sitting at Muskogee.

RALPH E. CAMPBELL,
Judge.

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64 And thereafter on the 14th day of March 1911, the Defendants Miami Investment Co. and George E. Bowling filed a Petition for allowance of Appeal with Supersedeas Bond and Assignment of Errors, which Petition for appeal was allowed by the Court.

Said Petition for Appeal, Assignment of Error, supersedeas and order allowing Appeal are in words and figures as follows:

65 In the Circuit Court of the United States for the Eastern District of Oklahoma.

United States of America, Complainant,
No. 575. vs. In Equity.
John E. Rundell, George E. Bowling, Miami Investment Company, et al., Defendants.

Petition for Appeal with Supersedeas.

The above named defendants, George E. Bowling and Miami Investment Company, each conceiving themselves aggrieved by the order and decree made and entered in the above entitled cause, on the 21st day of February, 1911, wherein and whereby it was ordered, adjudged and decreed that the certain deed made by Charles Stanley, Mollie Bigknife and Orillo Keno to John E. Rundell, under date of December 2, 1897, as alleged in paragraph VI of the Bill of Complaint, wherein and whereby the said persons, purporting to be the lawful heirs of the said Pe-te-lon-o-zah, or William Wea, did bargain, sell and convey unto one John E. Rundell the following described lands, to-wit:

The north half of the northeast quarter and lots three (3) and four (4) of section twenty-five (25), township twenty-eight (28), range twenty-two (22), northwest quarter of the northwest quarter and lots one (1) and two (2) of section thirty (30) township twenty-eight (28), range twenty-three (23) lot number one (1) of the northwest quarter of section twenty-seven (27), township twenty-eight (28), range twenty-two (22), in Peoria Reserve, Indian Territory.—

66 was made contrary to and in express violation of the provisions contained in the Act of Congress approved March 2, 1889, (25 Statutes at Large, page 1014—) under which the said lands were allotted to the said Pe-te-lon-o-zah,

or William Wea, providing that the said allotted lands should not be alienated for twenty-five years from the date of the patent, and that any contract or agreement to sell or convey the same before the expiration of the period of inalienability should be absolutely null and void, and conveyed to the said John E. Rundell no title whatsoever in and to the said lands; for which reasons that certain quit-claim deed made and executed by John E. Rundell and Florence Rundell, his wife, under date of May 31, 1899, as alleged in Paragraph VI of the Bill of Complaint, wherein and whereby the said John E. Rundell and Florence Rundell, his wife, quit-claimed to the defendant, George E. Bowling, all their right, title and interest in and to the following described lands, to-wit:

The north half of the northeast quarter and lots three (3) and four (4) of section twenty-five (25), township twenty-eight (28), range twenty-two (22); lot number one (1) in section Twenty-seven (27), township twenty-eight (28), range twenty-two (22), lots number one (1) and two (2) in section thirty (30), township Twenty-eight (28), range twenty-three (23), Quapaw Agency, Indian Territory.

conveyed no title to the grantee and is decreed to be null and void and ordered cancelled of record as a cloud upon the title of the lawful heirs of William Wea in and to said lands; for like reasons the certain quit-claim deed, made, executed and delivered by that grantee, George E. Bowling and Jennie Bowling, his wife, to John E. Rundell under date of August 4, 1899, as alleged in paragraph VI of the Bill of Com-
67 plaint, quit-claiming and conveying to the said John E. Rundell an undivided one-fifth interest in and to the said described lands, conveyed no title to the grantee, John E. Rundell, for which reasons the quit-claim deed made, executed and delivered by John E. Rundell and Florence Rundell, his wife, to the defendant Bartlett Cooley, as alleged in Paragraph VI of the Bill of Complaint, conveyed no title in and to the said lands to the said Bartlett Cooley, and therefore the certain quit claim deed made, executed and delivered by George E. Bowling and Jennie Bowling, his wife, Bartlett Cooley and K. J. Cooley, his wife, and Eugene Albright and Kate Albright, his wife, to the Miami Investment Company, under date of September 6, 1901, as alleged in Paragraph VI of the Bill of Complaint quit-claiming and conveying to the said defendant, The Miami Investment Company, all their right, title and interest in and to the lands herein before described, conveyed no title in and to the said lands to the said Miami Investment Company, defendant, and the deed is decreed to be null and void and of no legal effect and is ordered cancelled of record as a cloud upon the title of the lawful heirs

of the said Pe-te-lon-o-zah, or William Wea, in and to the said lands.

That the United States Court for the Northern District of Indian Territory, being itself a creature of Congress with limited jurisdiction, was not invested with jurisdiction to extend by a mere decretal order a power of alienation over the lands in question denied by the Act of Congress under which Pe-te-lon-o-zah was allotted with lands, and therefore, the judgment and decree of the said Court, rendered in the
68 case of Charles Stanley, Mary Bigknife, Orillo Keno Mohawk and John Mohawk, her husband, plaintiffs, vs. John E. Rundell defendant, under date of May 19, 1899, as alleged in paragraphs IX, X and XI of the Bill of Complaint, was ineffectual to convey any title or interest whatsoever in and to the hereinbefore mentioned lands to the said John E. Rundell under and through whom the defendants, George E. Bowling and the Miami Investment Company claim title in and to the said lands, and the judgment was and is of no legal effect against the lawful heirs of the said Pe-te-lon-o-zah in so far as it attempts to provide for, or decree, the sale, alienation and transfer of the said lands, and, therefore, these defendants who respectively claim title to said lands through the defendant, John E. Rundell, and mesne conveyances, acquired no interest, legal or equitable, in and to the said lands.

That the complainant have judgment against the said defendants, George E. Bowling and the Miami Investment Company for courts costs herein necessarily incurred, together with the statutory docket fee, to be taxed by the Clerk without notice to parties."

do hereby appeal from the said Order and Decree of February 21, 1911, to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the assignment of errors, filed herein, and hereto, and they pray that this appeal may be allowed and that a transcript of the record, papers and proceedings upon which said Order and Decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth
69 Circuit.

HALBERT H. McCLUER,
Solicitor for Defendants, Geo. E. Bowling and Miami Investment Co.

Endorsed on back: No. 575. United States of America, Complainant, vs. John E. Rundell, et al., Defendants. Petition for Appeal with Supersedeas. United States Circuit

Court Eastern Dist. Okla. Filed Mar. 14, 1911. L. G. Disney, Clerk.

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70 In the Circuit Court of the United States for the Eastern District of Oklahoma.

United States of America, Complainant,
No. 575. vs. In Equity.
John E. Rundell, George E. Bowling, Miami Investment Company, et al., Defendants.

Order Allowing Appeal and Supersedeas.

The above named defendants, George E. Bowling and Miami Investment Company, having duly filed their assignment of errors herein, and petition for appeal, on motion of Halbert H. McCluer, Esquire, Solicitor and of Counsel for above defendants, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final decree heretofore filed and entered herein, be, and the same is hereby allowed and that a certified transcript of the record, exhibits, stipulations and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred ($500) Dollars, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated this 14 day of March A. D. 1911.

RALPH E. CAMPBELL,
Judge, United States Court for the Eastern District of Oklahoma.

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71 In the Circuit Court of the United States for the Eastern District of Oklahoma.

United States of America, Complainant,
No. 575. vs. In Equity.
John E. Rundell, George E. Bowling, Miami Investment Company, et al., Defendants.

Assignment of Errors.

Comes now the above named defendants, George E. Bowling and Miami Investment Company, and files the following Assignment of Errors upon which they, and each of them, will rely on their appeal from the Order and Decree made by this Honorable Court in the above entitled cause on the 21st day of February, A. D. 1911.

I.

The Court erred in overruling the demurrer heretofore filed by these defendants, as against the bill of Complaint in this case.

II.

Because the court erred in holding that it had jurisdiction to hear, try and determine this cause.

III.

Because the court erred in granting the Complainant any relief on the Bill and Answer in this case.

IV.

Because on the Bill and Answer in this case, on which the same was submitted to the court, a finding and decree should have been entered in favor of these defendants,
72 and each of them, and dismissing the plaintiff's Bill.

V.

Because the Bill of Complaint does not state any cause of action whatever against these defendants, or either of them.

VI.

Because the Answer of these defendants states a good and meritorious defense in favor of each of these defendants, and against the Complainant.

VII.

Because on the facts stated in the Answer, which stands admitted on the record, a finding and decree should have been entered in favor of these defendants, and each of them, and against the Complainant, dismissing the Bill.

VIII.

Because the Court erred in holding that the deed executed by Charles Stanley, Mollie Bigknife and Orillo Keno to John E. Rundell, under date of December 2, 1897, was insufficient to convey the title to the lands in question, and should be set aside.

IX.

Because the court erred in holding that each and all of the quit claim deeds mentioned in the petition were invalid and should be set aside.

X.

Because the court erred in holding that the judgment and decree rendered in the case of Charles Stanley, Mollie Big-

knife and Orillo Keno Mohawk, and John Mohawk, her
73 husband, vs. John E. Rundell, under date of May 19th, 1899, was ineffectual to convey any title or interest whatever to the lands mentioned in the Bill to the said John E. Rundell.

XI.

Because the court erred in holding that the judgment in the case mentioned in the preceding assignment was without the jurisdiction of the court rendering the same, and was hence invalid.

XII.

Because the court erred in finding that on the facts set forth in the answer that the Miami Investment Company would not have a good and perfect title to the lands mentioned in the Bill of Complaint.

In order that the foregoing assignment of error may be and appear of record, the defendants, George E. Bowling and Miami Investment Company, present the same to this Honorable Court and pray that such disposition may be made thereof as is in accordance with the laws and statutes of the United States, in such cases made and provided, and the said defendants pray a reversal of the decretal order and decree in favor of the Complainant, made and entered by the said Court against these defendants; and that a decree may be entered in favor of these defendants; dismissing the Bill of Complainant herein sued on.

HALBERT H. McCLUER,
Solicitors for the defendants, George E. Bowling and Miami Investment Company.

Endorsed: No. 575. United States of America, Complainant, vs. John E. Rundell, et al., Defendants. Assignment of Errors. United States Circuit Court, Eastern Dist. Okla. Filed Mar. 14, 1911. L. G. Disney, Clerk.

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74 United States of America—Set.

Know all Men by These Presents, That we, Miami Investment Company, a corporation of Miami, Oklahoma, George E. Bowling and John McGilvray, of Jackson County, Missouri, are held and firmly bound unto the United States of America, in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs,

executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 7th day of March, in the year of our Lord, one thousand nine hundred and eleven.

Whereas, lately at the Vinita term of the Circuit Court of the United States for the Eastern District of Oklahoma in a suit pending in said court between United States of America, complainant, and Miami Investment Company and George E. Bowling, defendants, an order and decree was rendered against the said defendants, and the said defendants have obtained an appeal of the said court to reverse the said order and decree in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the said date of said citation.

Now, the condition of the above obligation is such, that if the said defendants shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

(Seal) GEO. E. BOWLING,
(Seal) MIAMI INVESTMENT CO.,
By H. H. McCluer, President.

Attest:
(Seal) Geo. E. Bowling, Secretary.
(Corporation Seal)

(Seal) JOHN McGILVRAY,
(Seal) .....
(Seal) .....

75 Signed and sealed in the presence of the undersigned by Miami Investment Co., Geo. E. Bowling & John McGilvray.

WILLIAM R. HALL,
WILLIAM H. MAY.

The above bond is hereby approved and ordered to be filed and made a part of the record.

Dated March 14, 1911.

RALPH E. CAMPBELL, Judge.

United States of America,
Western District of Missouri—ss.

John McGilvray obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated

therein, and is worth, over and above all his debts and liabilities, the sum of Two thousand Dollars; and that he owns Real Estate to that amount, subject to execution, in State of Missouri.

JOHN McGILVRAY.

Subscribed and sworn to before me this 7th day of March, A. D. 1911.

(Seal) WILLIAM R. HALL,
Notary Public, Jackson Co., Mo.

My term expires March 21st, 1911.

Endorsed: No. 575. United States of America, Complainant, vs. John E. Rundell, et al., Defendants. Supersedeas Bond. United States Circuit Court Eastern Dist. Okla. Filed Mar. 14, 1911. L. G. Disney, Clerk.

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76 The United States of America, To The United States of America—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the Circuit Court of the United States for the ..... Division, Eastern Judicial District of Oklahoma, wherein George E. Bowling and Miami Investment Company are appellants and you are appellee to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Ralph E. Campbell, Judge of the Circuit Court of the United States for the Eastern District of Oklahoma, this 14th day of March, in the year of our Lord one thousand nine hundred and Eleven.

RALPH E. CAMPBELL,
United States District Judge, for the Eastern District of Oklahoma.

No. 575. United States Circuit Court ..... Division of the Eastern Judicial District of Oklahoma. United States of America, Complainant, vs. John E. Rundell, et al., Defendants. Citation. United States Circuit Court, Eastern Dist Okla. Filed Mar. 21, 1911. L. G. Disney, Clerk. Due service of the within Citation is admitted this 20th day of March, 1911. Paul A. Ewert, Solicitor for Appellee.

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77 United States of America,
Eastern District of Oklahoma—ss.

I, L. G. Disney, Clerk of the United States Circuit Court for the Eastern District of Oklahoma, do hereby certify that the foregoing is a true and correct copy of so much of the record and proceedings in the case of United States of America vs. John E. Rundell, et al., No. 575, as appears on file and of record in my office at Muskogee, as was ordered to be prepared and authenticated, together with the original citation and the return thereon.

In Testimony Whereof, witness my hand and the seal of this Court, at Muskogee, Oklahoma, this 28th day of March, A. D. 1911.

Seal
U. S. Circuit Court,
Eastern District,
Oklahoma.

L. G. DISNEY, Clerk.
By H. E. Boudinot, Deputy.

Filed Apr. 1, 1911. John D. Jordan, Clerk.

(*Appearance of Counsel for Appellee.*)

On the first day of April, A. D. 1911, the appearance of counsel for appellee was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 3585.

GEORGE W. BOWLING and MIAMI INVESTMENT COMPANY,
Appellants,
vs.
UNITED STATES OF AMERICA, Appellee.

Notice of Appearance.

To John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit:

Kindly enter my appearance as Solicitor for the Appellee in the case of George W. Bowling and Miami Investment Company, Appellants, vs. United States of America, Appellee.

PAUL A. EWERT,
Special Assistant to the Attorney General, #315 Miners Bank Building, Joplin, Missouri.

(Endorsed:) No. 3585. George W. Bowling and Miami Investment Company, Appellants, vs. United States of America, Appellee. Notice of Appearance. Filed Apr. 1, 1911. John D. Jordan, Clerk. Paul A. Ewert, Solicitor for Appellee.

(*Appearance of Counsel for Appellants.*)

And on the eighth day of April A. D. 1911, the appearance of counsel for appellants was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3585.

GEORGE E. BOWLING et al., Appellants,
vs.
THE UNITED STATES OF AMERICA.

The Clerk will enter *my* appearance as Counsel for the Appellants.

HALBERT H. McCLUER,
1208 *Commerce Bldg., Kansas City, Mo.*
ROLAND HUGHES,
1318 *Commerce Bldg., Kansas City, Mo.*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3585. George E. Bowling, et al., Appellants, vs. The United States of America. Appearance. Filed Apr. 8, 1911. John D. Jordan, Clerk. Halbert H. McCluer, Roland Hughes, Counsel for Appellants.

(*Argument Commenced.*)

And on the twenty-fourth day of May, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order of argument in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1911.

WEDNESDAY, *May* 24, 1911.

No. 3585.

GEORGE E. BOWLING et al., Appellants,
vs.
THE UNITED STATES OF AMERICA.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Halbert H. McCluer for appellants and continued by Mr. Paul A. Ewert for appellee, and the hour for adjournment having arrived further argument is postponed until tomorrow.

(*Order of Submission.*)

And on the twenty-fifth day of May, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1911.

THURSDAY, *May* 25, 1911.

No. 3585.

GEORGE E. BOWLING et al., Appellants,
vs.
THE UNITED STATES OF AMERICA.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause having been called for further hearing argument was continued by Mr. Paul A. Ewert for appellee and concluded by Mr. Halbert H. McCluer for appellants.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the thirteenth day of October, A. D. 1911, the opinion of said United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1911.

No. 3585.

GEORGE E. BOWLING and MIAMI INVESTMENT COMPANY, Appellants,
vs.
UNITED STATES OF AMERICA, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

Mr. Halbert H. McCluer (Mr. Roland Hughes with him on the brief) for appellants.
Mr. Paul A. Ewert, Special Assistant to the Attorney General for the appellee.

Before Sanborn, Circuit Judge, and Marshall and W. H. Munger, District Judges.

MARSHALL, *District Judge*, delivered the opinion of the Court:

This suit was instituted by the United States against twenty-nine defendants to obtain a decree setting aside various conveyances of a tract of land originally allotted to Pe-te-lon-o-zah, or William Wea, a member of the Confederated Wea, Peoria, Kaskaskia and Piankeshaw Tribe of Indians, and also, to declare void a judgment rendered by the United States Court for the Northern District of the Indian Territory, which decreed a transfer of this land. As ground for this relief, the bill alleged an allotment and patent to William Wea of the land under an Act of Congress approved March 2, 1889, entitled "An Act to provide for allotment of land in severalty to the United Peoria and Miamies in Indian Territory, and for other purposes"; (25 Stats. 1013), the death of William Wea, intestate leaving heirs, a contract between certain Indians claiming to be the only heirs of said Wea, and one of the defendants, George E. Rundell, by which these heirs agreed to convey the land to Rundell for the purchase price of one-thousand dollars, twenty-five dollars of which was paid by Rundell at the date of the contract, the balance to be paid when the heirs established their right to convey and on delivery of a deed for the land; a suit instituted by

these heirs against Rundell for a specific performance of this contract, resulting in the judgment mentioned above, in which it was decreed that the plaintiffs in that suit were the only heirs of William Wea, had full right to convey this land, and that the contract be specifically enforced; a delivery of a deed to Rundell pursuant to this decree, and various mesne conveyances purporting to vest the title in the Miami Investment Company, one of the appellants; the fact that this judgment and all of these conveyances were prior to the expiration of the twenty-five year period of restraint on alienation imposed by the Act of Congress; and further, that the action instituted by the heirs of Wea against Rundell was collusive and a part of a fraudulent scheme to obtain title to this land in violation of the prohibition against alienation. Bowling, one of the mesne grantors, and the Miami Investment Company jointly demurred to the bill. This demurrer was overruled, and they then answered. The substantial facts alleged in the bill were admitted by the answer, except that all of the averments of collusion and fraud in respect to the action between the heirs of William Wea and Rundell were denied; and it was affirmatively alleged that this suit was instituted in good faith to settle an actual controversy, and the judgment therein was a complete estoppel against the prosecution of the present action. The cause was set down for hearing on bill and answer, and from the decree in favor of the United States, this appeal is prosecuted.

The questions involved, as stated in appellants' brief, are: (1) does the restraint on alienation of allotted land imposed by the Act of Congress run with the land so as to bind Indian heirs of the allottee, or, is it personal to the allottee, ceasing with his death? (2) has the United States such an interest as entitles it to maintain this suit in its own name? (3) is the judgment of the Territorial court a conclusive adjudication of this controversy?

As early as 1854, by a treaty with the United States, the Wea Tribe of Indians became confederated with the Peoria, Kaska-kia and Piankeshaw Tribes (10 Stats. 1082). By virtue of the treaty of February 23, 1867 (15 Stats. 513), this confederated tribe was permitted to dispose of the lands which they had theretofore acquired in Kansas, and with the proceeds, to purchase certain lands acquired by the United States from the Senecas and Quapaws and situated in the northeast part of what is now the State of Oklahoma. The land in controversy here is a part of the land so purchased. The twenty-second article of this treaty contained this clause:

"The land in the second and fourth articles of this treaty proposed to be purchased from the Senecas and Quapaws, and lying south of Kansas, is hereby granted and sold to the Peorias" (15 Stats. 839, 848). The general allotment act (24 Stats. 388) excepted the Peoria Indians, by which name the Confederated Tribe was known, from its provisions, but the act of March 2, 1889 (25 Stats. 1013), with the consent of these Indians, extended all of the provisions of the general allotment act, excepting Section 6, and, so far as was consistent with the other provisions of the Act, to the

Confederated Wea, Peoria, Kaskaskia and Piankeshaw Tribe of Indians. Section 6 of the general allotment Act conferred citizenship upon each Indian to whom an allotment of land was made under any law of or treaty made with the United States, but this exception became immaterial when by the Act of May 2, 1890, citizenship was expressly granted to the members of this tribe (26 Stats. 99).

With respect to the alienation of allotted land, it was provided in the Act of March 2, 1889, that "The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said land so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause a patent to issue to each and every person so entitled, for his or her allotment, and such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and shall also recite that such land so allotted and patented is not subject to levy, sale, taxation, or forfeiture for a like period of years, and that any contract or agreement to sell or convey such land or allotments so patented entered into before the expiration of said term of years shall be absolutely null and void." Under these statutory provisions the land in question was allotted to William Wea and a patent therefor issued to him, granting it in fee simple, but subject to the restraint on alienation prescribed by the Act of March 2, 1889. We are not concerned with the common law rule as to the effect of such a restraint on the fee simple title. The statute under which the patent issued was a law and changed the common law to the extent intended by Congress. This Court, in Goodrum v. Buffalo, 162 Fed. 817, held that such a restraint or alienation ran with the land so as to limit the power of the allottee's heirs to dispose of it. The case involved the title to allotted land in the same Quapaw Reservation in which Wea's allotment is situated. Both patent and statute were similar in respect to the restraint on alienation. The authorities were exhaustively considered, and it was there said:

"The language of the act and the patent could not have been more exact and clear to express the purpose and policy of the government to deny the power and right of these allottees to dispose of the lands in any manner until after the stated period of twenty-five years. As the greater includes the lesser, no contract, agreement, or obligation in form entered into by the allottee or his heirs within the limitation period could possibly have the effect to operate as, or result in, a transfer of the title to these lands to a third party."

We see no reason to depart from the rule laid down in this case.

In Goodrum v. Buffalo, supra, suit was brought by the Indian heirs; here the United States invokes the jurisdiction of its court to enforce this restraint imposed by its law. Its right to do so is denied by the appellants on the ground that the Indian heirs are citizens of the United States with all of the rights and immunities

of citizenship, and that the grant to their ancestor was of a fee simple title, no title remaining in the United States in trust for the heirs for the protection of which it could properly bring suit as trustee. Doubtless the heirs might have sued, and this is what was done in Goodrum vs. Buffalo, but the mere fact of citizenship does not so alter their relations with the government as to change their dependent status, nor to preclude the operation of laws intended to protect them in their property rights and based on the conclusion that they are not yet fitted to protect themselves. Beck v. Flournoy Live Stock & Real Estate Co., 65 Fed. 30; Marchie Tiger v. Western Investment Co., 221 U. S. 286. Admitting then as established that the United States has the power to impose this restraint on alienation for the protection of the Indian, has it the right to enforce the restraint by a civil action, not as guardian of the Indian, but as a government enforcing a law based on a great public policy?

This right has been affirmed by this court in United States v. Allen, 179 Fed. 13. In that case suit was brought by the United States to set aside conveyances made by members of the Five Civilized Tribes of Indians of allotted land in violation of restrictions imposed on alienation by the various statutes providing for the allotment. The Indians allottees were not parties to the suit nor was it instituted at their request. This court, speaking by Judge Amidon, said:

"Turning now to the objections which were made and sustained by the trial court, has the federal government such an interest as entitles it to maintain these suits? It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such an estate is necessary, it has no standing in court. It is, however, too plain for controversy, that the federal government imposed restrictions upon the alienation of these allotments. That restriction was its main reliance for the social and industrial elevation of the Indians. Has it a standing in court for the enforcement of its policy? To say that it has not is to make the restraints upon alienation a mere brutum fulmen. Shall the Indians who are intended to be restrained, be made the sole agency for the enforcement of the restraint? If so, the act of Congress is nothing more than a benevolent admonition. If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the nation a pauperized, discontented, and, possibly, belligerent people. To prevent such results the United States may invoke the aid of its courts. That question was put to rest in the decision of In re Debs, 158 U. S. 564. When a suit in equity is an appropriate method,

for the enforcement of a governmental policy, the national government may maintain such suit. The present case presents a right of the nation which has been violated and cannot be redressed in any other way than by a suit in equity. If its interest in its measures does not give it a standing in court, then the violation of those measures must go wholly without redress. Governmental action cannot thus be paralyzed. If the aid of the court is an appropriate remedy, the government has the same right to proceed in that manner that it has to use executive power where that power is an appropriate agency for the accomplishment of its purposes." This decision concludes the question in this court.

The third objection raised to this decree is in effect answered by U. S. v. Allen. If the United States has the right by a civil action to enforce the restraint on alienation in order to effect its public policy, this right cannot be destroyed by a decree in a suit to which it is not a party. As to the United States such a decree is res inter alios acta and has no greater effect than the voluntary conveyance of the allottee. In United States v. Allen, it was claimed by the defendant that there was a defect of parties because the Indian grantors were not made parties, and the decree, if adverse to the government, would not debar these grantors from subsequently seeking the same relief. It was held that the grantors were not necessary parties; and it was there said:

"The allottees in the present case do not come within the class of indispensable parties as thus defined. The cause of action set up in the bill is not theirs but the government's. True, if the government succeeds, their titles will be cleared of clouds; but, if it does not succeed, they will be left with their personal causes of action unaffected by what is done in the present litigation. It may be said that this very fact makes the presence of the allottees necessary to complete justice to the defendants. While the measure of justice in their favor would be more complete if the allottees were present, that fact does not render the allottees indispensable parties. It is not the mere convenience of the parties before the court which renders absent parties indispensable, but the protection of the rights of those absent parties. Looking at the entire litigation, justice to the defendants will also be promoted by this practice. The Indians have already parted with their lands by deed. While they have the legal right to assail the conveyances if they were made in violation of the statute against alienation, the exercise of that right by the Indians after a decision against the government in the present suit, is so problematical that it would be oppressive to compel the plaintiff to bring all allottees before the court, and would also add unnecessarily to the costs of the defendants in case the suits shall go against them. Again, the allottees, if present, would have no control over the suits. Their consent to a judgment in favor of the defendants would not defeat the right of the government. In our judgment, therefore, there is no defect of parties."

If a decree against the United States left unaffected the cause of action of the Indian grantor, on what theory can it be claimed

that a decree against the grantor bars the United States? The causes of action are entirely distinct. The right of the government is not derivative and is in its own behalf, not as a land owner it is true, but governmental to enforce its laws. The decision in United States v. Allen is so recent, was reached after exhaustive argument and investigation, and we must decline to treat the question as still open in this court.

The decree appealed from will, therefore, be Affirmed.

Filed October 13, 1911.

(*Decree.*)

And on the sixteenth day of October, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1911.

MONDAY, *October* 16, 1911.

No. 3585.

GEORGE E. BOWLING and MIAMI INVESTMENT COMPANY, Appellants,
vs.
THE UNITED STATES OF AMERICA.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause be, and the same is hereby affirmed without costs to either party in this Court.

October 16, 1911.

(*Petition for Appeal to Supreme Court U. S.*)

And on the twenty-ninth day of December, A. D. 1911, a petition for an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the 8th Circuit.

GEORGE E. BOWLING and THE MIAMI INVESTMENT COMPANY,
Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Petition for Appeal to the United States Supreme Court.

The above named appellants, George E. Bowling, and The Miami Investment Company, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the 8th Circuit, and that a judgment has therein been rendered on the 16th day of October, A. D. 1911, affirming the decree of the Circuit Court of the United States for the Eastern District of Oklahoma, and that the matter in controversy in said suit exceeds one thousand dollars besides costs; that this case is one in which the jurisdiction of the Circuit Court of Appeals is not made final by Section 6 of the Act of March 3, 1891, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellants pray that an appeal be allowed them in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the 8th Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellants, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

HALBERT H. McCLUER,
ROLAND HUGHES,
Attorneys for Appellants.

(Endorsed:) No. 3585. George E. Bowling, and The Miami Investment Company, Appellants, vs. United States of America, Appellee. Petition for Appeal to the United States Supreme Court. Filed Dec. 29, 1911. John D. Jordan, Clerk. Halbert H. McCluer, Roland Hughes, Attorneys for Appellants.

(*Assignment of Errors on Appeal to Supreme Court U. S.*)

And on the twenty-ninth day of December, A. D. 1911, an assignment of errors on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals for the 8th Circuit.

GEORGE E. BOWLING and THE MIAMI INVESTMENT COMPANY,
Appellants,
vs.
UNITED STATES OF AMERICA, Appellee.

Assignment of Errors.

The appellants in the above entitled cause, in connection with their petition for appeal herein, present and file therewith their assignment of errors, as to which matters and things they say that the decree entered hereon on the 16th day of October, A. D. 1911 is erroneous, to-wit:

I. The court erred in finding and adjudging that the United States Circuit Court for the Eastern District of Oklahoma had jurisdiction to hear, try and dispose of this case.

II. Because on the whole record in this case it is shown that the United States Circuit Court for the Eastern District of Oklahoma did not have jurisdiction to try or hear this case.

III. Because the origina- bill filed in this case does not state facts sufficient to entitle the appellee to relief granted, or to any relief whatever, and is wholly insufficient to support the decree entered in this case.

IV. Because the court erred in finding that the matters set forth in the answer of these appellants was insufficient to constitute a defense in favor of these appellants.

V. Because the court erred in finding that under the bill and answer the appellee was entitled to a decree.

VI. Because the court erred in holding that the judgment of the United States Court for the Northern District of the Indian Territory, sitting at Wagner, was insufficient to bind the appellee herein.

VII. Because the court erred in holding that the United States was not estopped by the judgment and proceeding by the United States Court for the Northern District of the Indian Territory sitting at Wagner, to deny the validity of the said judgment and its binding force upon the rights of the parties to the said suit.

VIII. Because the court erred in holding that the restriction against alienation contained in the patent to William Wea was not personal, but ran with the land.

IX. Because the court erred in not entering judgment in favor of these appellants on the bill and answer.

Wherefore the appellants pray that said decree may be reversed and that the appellants may have an adjudication and decree in their favor as herein specified.

HALBERT H. McCLUER,
ROLAND HUGHES,
Attorneys for Appellants.

(Endorsed:) No. 3585. George E. Bowling, and The Miami Investment Company, Appellants, vs. United States of America, Ap-

pellee. Assignment of Errors on Appeal to Supreme Court, U. S. Filed Dec. 29, 1911. John D. Jordan, Clerk. Halbert H. McCluer, and Roland Hughes, Attorneys for Appellants.

(*Bond on Appeal to Supreme Court U. S.*)

And on the twenty-ninth day of December, A. D. 1911, a bond on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the 8th Circuit.

GEORGE E. BOWLING and THE MIAMI INVESTMENT COMPANY,
Appellants,
vs.
UNITED STATES OF AMERICA, Appellee.

Bond for Appeal.

Know all men by these presents that we, George E. Bowling of the County of Jackson and State of Missouri, and the Miami Investment Company of the County of Ottawa, and State of Oklahoma, and John McGilvray, *and* of the County of Jackson and State of Missouri, are held and firmly bound unto the United States of America in the sum of ($1,000.00) One Thousand Dollars, to be paid to the said United States of America; we bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 21 day of December A. D. 1911.

Wher-as the appellants in the above entitled suit have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the 8th Circuit on the 16th day of October, A. D. 1911.

Now therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

THE MIAMI INVESTMENT CO.
By GEO. E. BOWLING, *Sec'y & Treas.*
GEO. E. BOWLING.
JOHN McGILVRAY.

STATE OF MISSOURI,
County of Jackson, ss:

Geo. E. Bowling, principal, and John McGilvray, surety named in the foregoing bond, being first duly sworn, each for himself says: That he is a resident and freeholder in the County of Jackson and State of Missouri, and is worth the sum of One Thousand Dollars

over and above all his just debts and liabilities, exclusive of property exempt *form* execution.

GEO. E. BOWLING.
JOHN McGILVRAY.

Subscribed and sworn to before me this 21st day of December, A. D. 1911. My term expires March 20th, 1915.

[SEAL.] WILLIAM R. HALL,
Notary Public within and for Jackson County, Missouri.

The foregoing bond is approved this 29th day of December, A. D. 1911.

WALTER H. SANBORN,
United States Circuit Judge, 8th Circuit.

(Endorsed:) No. 3585. George E. Bowling, and The Miami Investment Company, Appellants, vs. United States of America, Appellee. Bond on Appeal to Supreme Court, U. S. Filed Dec. 29, 1911. John D. Jordan, Clerk. Halbert H. McCluer, Roland Hughes, Attorneys for Appellants.

(*Affidavit as to Amount in Controversy.*)

And on the twenty-ninth day of December, A. D. 1911, an affidavit as to amount in controversy was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the 8th Circuit.

GEORGE E. BOWLING and THE MIAMI INVESTMENT COMPANY,
Appellants,
vs.
UNITED STATES OF AMERICA, Appellee.

Affidavit as to Amount in Controversy.

STATE OF MISSOURI.
County of Jackson, ss:

I, George E. Bowling, of said County, being duly sworn on my oath, say, that I am one of the above named appellants, and am duly authorized agent and representative of the Miami Investment Company, the other appellant; that this affidavit is made for and on behalf of both appellants; that the judgment from which an appeal is sought is one setting aside and cancelling certain deeds to a tract of land situated in the Eastern District of Oklahoma, consisting of two hundred (200) acres of land and which was originally allotted to one William Wea, and also a certain judgment rendered by the United States Court for the Northern District of the Indian Territory sitting at Wagner; that these appellants claim title to the said tract through

said deeds and judgments which are set aside and cancelled and for naught held by the decree from which an appeal in this case is sought, and the effect of the judgment is to deprive appellants of their titles to said land; that the value of said land is largely in excess of Five thousand dollars, and that the matters referred to and in controversy in this suit exceed the sum and value of Five thousand dollars exclusive of interest and costs.

GEO. E. BOWLING.

Subscribed and sworn to before me this 21st day of December, 1911. My Commission expires March 20, 1915.

[SEAL.] WILLIAM R. HALL,
Notary Public within and for Jackson County, Mo.

(Endorsed:) No. 3585. George E. Bowling, and the Miami Investment Company, Appellants, vs. United States of America, Appellee. Affidavit as to amount in Controversy. Filed Dec. 29, 1911. John D. Jordan, Clerk. Halbert H. McCluer, Roland Hughes, Attorneys for Appellants.

(Order Allowing Appeal to Supreme Court U. S.)

And on the twenty-ninth day of December, A. D. 1911, an order allowing an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the 8th Circuit.

GEORGE E. BOWLING and THE MIAMI INVESTMENT COMPANY,
Appellants,
vs.
UNITED STATES OF AMERICA, Appellee.

Order Allowing Appeal to United States Supreme Court.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

December 29, 1911.

WALTER H. SANBORN,
United States Circuit Judge, 8th Circuit.

(Endorsed:) No. 3585. George E. Bowling, and the Miami Investment Company, Appellants, vs. United States of America, Appellee. Order allowing Appeal to United States Supreme Court. Filed Dec. 29, 1911. John D. Jordan, Clerk. Halbert H. McCluer, Roland Hughes, Attorneys for Appellants.

(Citation on Appeal to Supreme Court U. S.)

And on the sixth day of January, A. D. 1912, a citation on Appeal to the Supreme Court of the United States was filed in said cause, the original of which with admission of service thereof is hereto attached and herewith returned:

United States Circuit Court of Appeals for the 8th Circuit.

GEORGE E. BOWLING and THE MIAMI INVESTMENT COMPANY, Appellants,
vs.
UNITED STATES OF AMERICA, Appellee.

Citation.

To the United States of America:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the 8th Circuit, wherein George E. Bowling and the Miami Investment Company are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter H. Sanborn judge of the United States Circuit Court of Appeals, for the 8th Circuit, this 29 day of December A. D. 1911.

WALTER H. SANBORN,
Judge United States Circuit Court of Appeals, 8th Circuit.

[Endorsed:] No. 3585. George E. Bowling, and the Miami Investment Company, Appellants, vs. United States of America, Appellee. Citation on Appeal to Supreme Court U. S. Halbert H. McCluer and Roland Hughes, Attorneys for Appellants. Due service of the within citation is admitted this 4th day of January, 1912. Paul A. Ewert, Solicitor for Appellee. Filed Jan. 6, 1912. John D. Jordan, Clerk.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the

United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein George E. Bowling and Miami Investment Company are Appellants, and The United States of America is Appellee, No. 3585, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the eighteenth day of December, A. D. 1911, a mandate was issued out of said United States Circuit Court of Appeals for the Eighth Circuit in said cause, directed to the Judges of the Circuit Court of the United States for the Eastern District of Oklahoma.

I do further certify that the original citation with admission of service thereof is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twelfth day of January, A. D. 1912.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 23,033. U. S. Circuit Court Appeals, 8th Circuit. Term No. 532. George E. Bowling and Miami Investment Company, appellants, vs. The United States of America. Filed January 25th, 1912. File No. 23,033.

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No. 177.

IN THE

Supreme Court of the United States.

No. 332.

GEORGE E. BOWLING and MIAMI INVESTMENT COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR APPELLANTS.

JAMES H. HARKLESS,
HALBERT H. MCCLUER,
ROLAND HUGHES,
Solicitors for Appellants.

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INDEX (Cont.)

IN THE

Supreme Court of the United States.

No. 532.

GEORGE E. BOWLING and MIAMI INVESTMENT COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE.

This is a suit in equity instituted by the United States of America against George E. Bowling and Miami Investment Company, the appellants, and others, in the United States Circuit Court for the Eastern District of Oklahoma, at Muskogee, the object and general purposes of which were to set aside certain deeds described in the bill, and also a certain judgment described in the bill.

Bill of Complaint.

The bill of complaint is quite voluminous, and is set forth in full in the printed transcript of the record, and is shown commencing at page one (1) and extending to and including page sixteen (16).

For the purposes of this case, as we apprehend, it will not be necessary to copy this bill in full in this statement, but to set forth the substance of the allegations set forth therein, which, in short, are as follows:

Certain lands (describing them) located within the Eastern District of Oklahoma were allotted by the United States Government to Pe-Te-Lon-O-Zah, or William Wea, under and by virtue of the provisions of an Act of Congress approved March 2nd, 1889, entitled "An Act to provide for allotment of lands in severalty to the United Peorias and Miamis in the Indian Territory and for other purposes." (25 Statutes 1013).

In accordance with said allotment, there was on the 8th day of April, 1890, issued to said William Wea, a patent for the lands that were allotted to him, conveying same to said Wea and his heirs, upon the terms, conditions, limitations and immunities of the said Act of Congress above referred to. (A copy of the patent referred to in the bill is attached thereto as Exhibit "A," and is shown on page 12 of the transcript of the record.)

That thereafter, and on or about the 23rd day of January, 1894, the said William Wea died intestate, seized of the real estate which had been allotted and patented to him, as above stated, leaving as his heirs at law, a number of persons whose names and places of residence are alleged to have been unknown to the pleader; which said several heirs are entitled to take said land and the assets and interest of the said William Wea by inheritance.

That thereafter and on the 2nd day of December, 1897, one John E. Rundell, one of the defendants, in violation of the provisions of said Act of Congress, unlawfully and inequitably induced certain persons, *viz.*, Charles Stanley, Mary Bigknife and Orillo Keno Mohawk, who claimed and represented themselves to be the heirs-at-law of the said William Wea, to make, execute and deliver to the said John E. Rundell their deed purporting to convey to him the lands allotted to said William Wea, and that thereafter the appellants Bowling and Miami Investment Company became the grantees of the said land through several mesne conveyances mentioned in the bill.

The bill then charges that all of said deeds and conveyances were absolutely and wholly void in law and in fact, for the reason that each and all of same were made, executed and delivered within the time mentioned in the original patent from the United States to William Wea, in which the said land should not be alienated.

The bill then charges that on the 19th day of May, 1899, in an action then pending in the United States Court for the Northern District of the Indian Territory at Wagoner, wherein Charles Stanley, Mary Bigknife, Orillo Keno Mohawk and John

Mohawk, her husband, were plaintiffs, and the said John E. Rundell was defendant, judgment was rendered in favor of the plaintiffs, adjudging and decreeing the validity of a certain contract theretofore made and entered into, by the terms of which the said Charles Stanley, Mary Bigknife, Orillo Keno Mohawk and John Mohawk, her husband, agreed to convey to said John E. Rundell the land above mentioned.

That in said action, it was alleged by the plaintiffs that they had entered into a contract to sell and convey said lands to the defendant John E. Rundell for the consideration of $1,000. That $25 of said consideration had been paid and that there remained due and unpaid to them the sum of $975, and that they were the sole heirs of William Wea, deceased, and had a full and perfect right to sell and convey said lands, and tendered their deed of conveyance therefor to the defendant John E. Rundell, and demanded judgment against him for the sum of $975, being the balance due on their contract of sale.

That afterwards said Rundell filed his answer to said suit, admitting execution of the contract set out in the plaintiffs' petition, but denying that plaintiffs therein were the sole heirs of William Wea, deceased, and further denying that said plaintiffs at the time of filing said petition had the right to sell and convey said lands, and asked to be relieved and discharged of the obligation of accepting the deed and paying the balance due under the contract of purchase.

That the action and the pleading to the issues raised thereby were a part of a fraudulent scheme entered into by defendant Rundell at the time said contract of sale was made and carried on, and conducted by him for the purpose, and with the intent of securing under color of a decree of court a title to said land, and for the purpose of circumventing and evading the provisions of the above Act of Congress.

The said bill prays that all of the deeds and said judgment mentioned be set aside and canceled, and that complainant be granted all proper relief.

Attached to the bill as Exhibit "B," shown on page 13 of the transcript of the record, is the petition in the suit instituted at Wagoner, Indian Teritory, the judgment in which is sought to be set aside.

There is also attached to said bill, and shown on page 15 of the transcript of the record, the answer of John E. Rundell, filed in said suit.

Demurrer.

The appellants Geo. E. Bowling and Miami Investment Company, after duly entering their appearance, filed a demurrer to the bill of complaint, which is set forth in full on pages 17, 18 and 19 of the transcript of the record, and which charged in substance that the petition did not set forth facts showing that the complainant was entitled to equitable relief, and did not show that the complainant had any such interest in the controversy as entitled it to institute, maintain or prosecute this proceeding.

That thereafter, and on September 12, 1910, the Circuit Court at Muskogee, in an opinion rendered by His Honor Judge Campbell, held that the demurrer should be overruled, and entered a formal order on the 29th of October, 1910, overruling the demurrer.

The opinion is shown in full, commencing on page 20 of the transcript of the record, and the order overruling the demurrer on page 25 of the transcript of the record.

The appellants herein each saved their exceptions to the action of the court in overruling the demurrer theretofore filed by them, and their exceptions are shown in the order of the court set forth on page 25 of the transcript of the record.

Thereafter, and on the 9th of November, 1910, and within the time allowed by the court, these appellants filed their answer, which is shown in full in the transcript of the record, commencing at page 26, and extending to page 36, and which answer, omitting the caption and signatures, is as follows:

Separate Answer of the Defendants, Miami Investment Company and George E. Bowling.

Now, at this day, comes the Miami Investment Company, a corporation organized and existing under and by virtue of the laws of the United States in force in the Indian Territory at the time of the organization of said Company, and now existing under the laws of the State of Oklahoma; and Geo. E. Bowling, a citizen of the State of Missouri, residing in Jackson County, in said State, defendants in the above entitled cause, and for their separate answer herein admit, deny and allege as follows, to-wit:

These defendants admit that the defendants W. L. McWilliams, J. F. Robinson, Mary Buck, Charles Stanley, Orillo Keno Mohawk, John Mohawk, W. I. Bingham, J. E. Supernaw and J. K. Stephens, are each and all residents and citizens of the State

of Oklahoma, residing in the Eastern Judicial District thereof, and that the said W. I. Bingham, J. E. Supernaw and J. K. Stephens, at the time of the filing of the bill herein, were the County Commissioners of Ottawa County, Oklahoma.

These defendants, further answering, say that they do not know the residences of the defendants Charles E. Swan, Mildred E. Swan, W. H. Grant, Sadie Grant, Hi Fee and Mary M. Fee.

These defendants, further answering, say that ——— Buck, the husband of Mary Buck, departed this life prior to the filing of the bill in this case, and that the defendant Mary Buck has since said date intermarried with one ——— Daugherty, whose first name is to these defendants unknown.

These defendants, further answering, admit that the defendant Jennie Bowling is the wife of the defendant George E. Bowling, and is a citizen of the State of Missouri, residing in Jackson County, in said State; and they admit that the Barton County Building & Loan Association was a corporation organized and existing under the laws of the State of Missouri, having for its principal office the town of Lamar, Barton County, Missouri; and allege that prior to the filing of the bill said corporation was duly dissolved and ceased doing business as such. Defendants admit that the defendant Bartlett Cooley is a resident and citizen of the State of Kansas, residing in Galena, Cherokee County, in said State; and state that Kate J. Cooley, the wife of Bartlett Cooley, departed this life prior to the filing of the bill; and allege that John E. Rundell departed this life prior to the filing of the bill in this case; and further answering, deny that Florence Rundell is a resident of the State of Kansas, residing at Galena, Cherokee County, in said State; and allege that said Florence Rundell is a citizen of the State of Oklahoma, residing at Sapulpa, in said State.

These defendants, further answering, admit that the defendants Eugene Allbright and Kate Allbright, his wife, are residents and citizens of the State of Illinois, residing in the City of Chicago, in said State. And these defendants state that the residences of the parties as set forth above was the same at the filing of the bill in this case as they are at this time.

II.

These defendants, answering the first paragraph of the bill in this case, say that they deny that in granting lands to the

Indian tribes and members thereof, especially the confederated Wea, Peoria, Kaskaskia and Piankeshaw tribes of Indians, it became and was the policy of the United States Government to grant such lands only upon such terms, conditions and limitations as would insure to the grantees the retention and conservation of the lands so granted; and these defendants deny that because of the weak, helpless and dependent character of the Indian people it also became and was and is the policy of the Government, in making such grants to the Indian tribes and the members thereof, to guarantee and promise to secure to the grantees, their heirs and successors, the exclusive possession and full enjoyment of the lands so granted.

III.

These defendants, answering the second paragraph of the bill in this case, say that they deny that the United States Government has always, and now does, assume the relation of guardian over the Indian tribes and the members thereof; and deny that its political department has always declared and now declares such relation to exist.

These defendants, further answering said paragraph, say that they deny that the bill in this case was filed on behalf of certain members of the confederated Wea, Peoria, Kaskaskia and Piankeshaw tribes of Indians; and deny that the bill was filed on behalf of the unknown heirs of William Wea, deceased, and deny that it was brought at the request or by the consent of any of the heirs of William Wea, deceased, and deny that it was brought on behalf of the Government or by any right or authority whatsoever.

IV.

These defendants, answering the third paragraph of the bill in this case, say that they admit that by an Act of Congress, approved March 2, 1899, entitled, "An Act to provide for allotment of land in severalty to the United Peoria and Miamis in Indian Territory, and for other purposes" (25 Stats. 1013), the Secretary of the Interior was authorized and directed to allot in severalty to the members of the said Confederated Wea, Kaskaskia and Piankeshaw tribes of Indians a certain quantity of land within the limits of the reservation, theretofore granted to the said Confederated Tribes of Indians for their use and occupancy, but deny that the same was to be allotted upon the guarantees mentioned and set forth in the first paragraph of the bill of complainant filed in this case.

These defendants, further answering said paragraph, admit that said lands were at the date of the passage of said Act, occupied by said Confederated Tribes of Indians, but deny that they have been so occupied ever since said date.

These defendants, further answering said paragraph of the bill in this case, deny that the lands to be allotted in severalty were not to be subject to alienation for twenty-five (25) years from the date of the issuance of the patent therefor; and they deny that the lands so allotted and patented were to be exempt from levy, sale, taxation or forfeiture for a like period of years; but they admit that the Secretary of the Interior was to cause a patent to issue to each and every person so entitled for his or her allotment, and that such patent was to recite in the body thereof a restriction upon alienation thereof, as provided by said Act, and that said patent should also recite the immunity from levy, sale, taxation and forfeiture as provided in said Act.

And these defendants, further answering said paragraph, say that they deny that any contract or agreement to sell or convey said lands or allotment so patented, entered into before the expiration of said twenty-five (25) years from the date of said patent, was to be null and void.

V.

These defendants, answering the fourth paragraph of the bill heretofore filed in this cause, say that they admit that under and by virtue of the aforesaid Act of Congress and in accordance with the terms and provisions thereof, the said Pe-te-lon-o-zah, or William Wea, during his lifetime, selected and had set apart to him as his distributive share of the lands belonging to said tribe in the Indian Territory, the following described lands, to-wit:

The north half of the northeast quarter, and lots numbered three and four, of Section 25, and lot numbered one of Section 27, in Township 28 north, Range 22 east, and lots numbered one and two of Section 30, Township 28 north, Range 23 east of the Indian Meridian, containing in the aggregate 198.88 acres; which said lands are located within the Eastern District of Oklahoma, and within the jurisdiction of this court. And further show that the said selection was the personal allotment of the said Pe-te-lon-o-zah or William Wea, was duly approved by the Secretary of the Interior in accordance with the provisions of said Act of Congress; that afterwards and on, to-wit, the 8th day of April, 1890, there was duly issued to the said Pe-te-lon-o-zah, or William Wea, by

the President of the United States, the Honorable Benjamin Harrison, a patent for the above described lands, which patent conveyed said lands unto the said Pe-te-lon-o-zah or William Wea, and his heirs, upon the terms, conditions, limitations and immunities of the Act of Congress.

VI.

These defendants, answering the fifth paragraph of the bill in this case, say that they admit that the said Pe-te-lon-o-zah, or William Wea, died intestate on or about the 23rd day of January, 1894, seized of the real estate above described, leaving as his heirs at law a number of persons. But they deny that said several heirs are entitled to take said land and estate and interest of the said Pe-te-lon-o-zah, or William Wea, therein by inheritance or otherwise.

VII.

These defendants, answering the sixth paragraph of the bill heretofore filed in this case, say that they deny that the defendant, John E. Rundell, in violation and defiance of the provisions of said Act of Congress, unlawfully and inequitably or in any other manner, induced certain persons, viz.: Charles Stanley, Mary Bigknife and Orillo Keno Mohawk, to execute and deliver to the said John Rundell their deed purporting to convey to him the lands above described; but admit that the said John Rundell did receive a deed from said parties, who, at said time, claimed and represented themselves to be the heirs at law of the said William Wea, and that said deed was received upon the consideration and in the manner and under circumstances as fully set forth hereinafter in this answer.

These defendants, further answering said paragraph, say that they admit that on the 31st day of May, 1899, the said John Rundell and his wife Florence Rundell, executed and delivered their quit claim deed, for the purported consideration of one thousand dollars ($1,000.00), to the defendant, George E. Bowling; that afterwards, and on to-wit, the 14th day of August, 1899, the said George E. Bowling and his wife Jennie Bowling, executed and delivered to the said John E. Rundell their quit claim deed to the premises hereinbefore described for the purported consideration of one dollar ($1.00); and that afterwards and on to-wit, the 17th day of May, 1901, the defendants, John E. Rundell and his wife, Florence Rundell, executed and delivered to the

defendant Bartlett Cooley their quit claim deed to the premises, hereinbefore described for the purported consideration of one thousand six hundred dollars ($1,600.00); and that thereafter in the defendants, George E. Bowling and Jennie Bowling, his wife, Bartlett Cooley and Kate J. Cooley, his wife, Eugene Allbright and Kate Allbright, his wife, executed and delivered to the defendant, Miami Investment Company, a corporation, their quit claim deed under date of September 6, 1901, conveying to the said corporation the lands hereinbefore described, for a purported consideration of seven thousand five hundred dollars ($7,500.00). That thereafter, and on, to-wit, the 19th day of November, 1901, the said defendant, Miami Investment Company, a corporation, caused a part of the land hereinbefore described to be surveyed into lots and blocks, streets and alleys, and platted into an addition to the town of Miami, known and designated as the Miami Investment Company's First Addition to Miami, Indian Territory, and caused said plat, together with the dedication thereof and of the streets and alleys in said plat, to public use, to be filed for record on the 30th day of November, 1901, in the office of the clerk of the United States Court at Miami, Indian Territory.

But these defendants deny that said purported dedication of the streets and alleys by said Miami Investment Company to the use of the public, was an unlawful and unequitable invasion of the rights of the complainant, or of the heirs of said William Wea, in said land; and deny that it was wholly unauthorized in law or equity.

These defendants, further answering said paragraph, say that afterwards, and on, to-wit, the 26th day of November, 1901, the Miami Investment Company sold and conveyed lot sixteen in block one of the Miami Investment Company's First Addition to the town of Miami, to the defendant Charles E. Swan, who afterwards executed a mortgage on said lot to the defendant, Barton County Building and Loan Association, a corporation, to secure the payment of the sum of two hundred dollars ($200.00); that afterwards, and on, to-wit, the 25th day of April, 1902, the defendant, Miami Investment Company, a corporation, conveyed to the defendant, W. H. Grant, Lot 9, Block 6, in said addition; and that afterwards, and on, to-wit, the 6th day of June, 1902, the said W. H. Grant and wife executed to the defendants, George E. Bowling and Eugene Allbright, a mortgage on said lot to secure the payment of the sum of three hundred dollars ($300.00); that afterwards, and on, to-wit, the 29th day of September, 1902, the de-

fendants, Charles E. Swan and Mildred E. Swan, his wife, sold and conveyed said Lot 16 in Block 1 of said addition to the defendants, Hi Fee and Mary M. Fee, his wife, subject to the mortgage thereon to the defendant, Barton County Building and Loan Association.

VIII.

These defendants, answering the seventh paragraph of the bill, say that they deny that all or any one of the written instruments referred to in said paragraph were or are void in law or in fact.

IX.

These defendants, answering the eighth paragraph of the bill, say they admit that all instruments referred to in said paragraph have been duly filed and recorded; but deny that all or any of said instruments were taken in violation or defiance of the provisions of law, and deny that all or any one of said instruments are void or illegal or ineffectual to convey title; but allege that each and all of said instruments are valid conveyances, transferring and conveying the interest in said land which they purported to convey.

X.

These defendants, answering the ninth paragraph of the bill, say that they admit each and all of the allegations in said paragraph as therein set forth.

XI.

The defendants, answering the tenth paragraph of the bill, deny that the action mentioned in the ninth paragraph and referred to in the tenth paragraph of the bill heretofore filed, and the pleadings filed in said case, were a part of a fraudulent scheme entered into by the defendant, John E. Rundell; and deny that the said John E. Rundell entered into any fraudulent scheme whatever in relation thereto; and deny that said suit was intended to secure under color of a decree of court, a title to the land described in the bill of complaint; and deny that the same was for the purpose of circumventing and evading the provisions of the Act of Congress under which the lands were allotted; and deny that same was an attempt to violate the terms and conditions of the patent issued to the allottees.

These defendants, further answering said paragraph, say that they deny that said action was not a real and substantial controversy between the parties thereto, and deny that the defendant, John E.

Rundell, paid or employed an attorney who represented the plaintiffs in said suit, and deny that said attorney was a representative of the said John E. Rundell; and deny that the judgment procured in said action was procured by reason of the fraud and deception between the parties thereto practiced upon the court.

These defendants, further answering said paragraph, deny that at said time the Secretary of the Interior had the direct management, control or supervision of the lands of the allottees of the Peoria-Miami band of Indians in the Indian Territory; and deny that the said Secretary at said time had the management, control or supervision of the lands in controversy herein.

XII.

The defendants, answering the eleventh paragraph of the bill heretofore filed in this case, say that they deny that the United States Court for the Northern District of the Indian Territory, sitting at Wagoner, was without jurisdiction of the subject matter of the said suit, heretofore mentioned; and deny that the court was without jurisdiction to render a decree binding the plaintiffs or their right, title, estate or interest in any lands belonging to them; and deny that said plaintiffs Charles Stanley, Mary Bigknife and Orillo Keno Mohawk were without legal capacity to sue or maintain such action; and deny that said court was without jurisdiction to render any judgment or decree therein which would be binding upon them or affect the title, right and interest of the United States in said land, and deny that the United States, as trustee had any interest in said land.

And these defendants, further answering said paragraph, deny that the judgment rendered in said case was void; and deny that any of the acts or proceedings in the same were unlawful or were against equity and good conscience, or that same tended to manifest wrong and injury of the complainant, or to the heirs of William Wea, deceased.

XIII.

These defendants, answering the twelfth paragraph of the bill of complaint herein filed, say that they deny that the acts of these defendants, or of those parties under whom they claim, were in violation and defiance and evasion of the laws of the United States, or of the will of Congress, or in violation of the duty owing by the complainant to the Indians; and deny that any of the acts of these defendants or of those under whom they claim were prejudicial

to the control or government of said Indian tribes or the members thereof; and deny that it is the duty of said complainant, by reason of its guaranties to protect the Indians in the enjoyment and possession of the land granted to them under the Act of Congress authorizing the allotment of lands to the United Peorias and Miamis; and deny that the complainant has any guardianship over the members of said tribes, or the individual members thereof, or the right to bring this bill.

XIV.

These defendants, further answering the bill of complaint in this case, say there is a misjoinder of parties defendant, in this, that the heirs or legal representatives of John E. Rundell, deceased, are not made parties hereto.

XV.

These defendants, further answering said bill of complaint, say that there is no equity in the said bill and that a full, adequate and complete remedy at law exists, if any cause of action exists whatever.

XVI.

These defendants, further answering the bill, allege that the lands mentioned in the bill of complaint filed in this case were allotted to one Pe-te-lon-o-zah, or William Wea, under and by virtue of the provisions of an Act of Congress entitled "An Act to provide for allotment of lands in severalty to the United Peoria and Miami Indians in Indian Territory, and for other purposes." Passed and approved March 2, 1899, and that said allotment was made strictly in accordance with the provisions of said Act; that subsequently to the receiving of the said allotment, the said William Wea departed this life intestate, and that at the time of his death left surviving him, as his sole and only heirs, his cousins, Charles Stanley, Orillo Keno Mohawk and Mary Bigknife, to whom said lands descended upon his death.

These defendants, further answering, state that on May 2, 1890, by a special Act of Congress (26 Statutes at Large, p. 99), the members of the United Peoria and Miami Indians were expressly declared to be citizens of the United States, and were granted all the rights, privileges and immunities as such, and that at said date the guardianship, if any guardianship ever existed on behalf of the United States over said tribes of Indians and the individual mem-

bers thereof, ceased and terminated and the individual members of said tribes became and were citizens of the United States, possessed of all rights and power as such, and ceased to be special favorites of the law.

These defendants, further answering, say that on the second day of December, 1897, the above mentioned Charles Stanley, Mary Bigknife, under the name of Mollie Bigknife, and Orillo Keno Mohawk, under the name of Orillo Keno, entered into a contract in writing with one John E. Rundell, by the terms of which the said parties agreed to convey to the said John E. Rundell the lands mentioned in the bill of complaint, for a consideration of one thousand dollars ($1,000.00). Twenty-five dollars ($25.00) of which, as shown by said contract was paid in cash and the balance to be paid when the said parties had established their rights to said land and a right to convey the same and make and deliver a good and sufficient warranty deed unto the said John E. Rundell; that subsequent thereto the said Charles Stanley, Mary Bigknife and Orillo Keno Mohawk instituted a suit in equity in the United States Court for the Northern District of the Indian Territory, sitting at Wagoner, in said District against the said John E. Rundell, praying in the said suit for a specific performance of their contract of sale, as above set forth, and that said suit was commenced on March 2, 1898.

These defendants, further answering, say that the plaintiffs and the defendants in the said suit were, at the time of filing the same all citizens of the United States, and were all residing in the Northern District of the Indian Territory, and that the land involved in the said suit was situated in the said District, and that said United States Court had jurisdiction of the persons and of the subject matter of said suit, and of the right to decide and to determine the issues involved therein; that said suit was brought in good faith and so prosecuted for the purpose of determining the rights of the respective parties to said contract. That in said suit there was tendered to the said John E. Rundell a deed duly executed by said parties conveying to the said John E. Rundell the said lands, and tendered in said suit as full compliance by the plaintiffs of their part of said contract. That a hearing in said cause resulted in a finding and judgment in favor of the plaintiffs, wherein it was adjudged and decreed that the contract entered into between said plaintiffs and the said defendant was a good, valid and subsisting contract, and that the deed tendered to the defendant conveyed to

him a legal title to the said land, and directing that the same be delivered to him as a full compliance upon the part of said plaintiffs and of their part of said contract, and ordered and adjudged that the said plaintiffs have and recover from the said John E. Rundell the sum of $975.00 and costs of suit, as the payment in full of said premises; and that afterwards the said John E. Rundell satisfied the said judgment in full by paying to the parties entitled thereto the said sum of $975.00, with interest thereon to the date of payment, together with all costs of the suit, and accepted said deed and placed the same upon the records.

And these defendants, further answering, say that said deed conveyed to the said John E. Rundell good and valid title in fee simple to said lands. And these defendants, further answering, say that the decisions of the said court as to the validity of said title so acquired by the said John E. Rundell became and was *res judicata* and as such is set up in this answer as a defense thereto.

XVII.

These defendants, further answering the bill of complaint, say that they deny each and all of the allegations in the bill of complaint herein filed which have not been herein specifically admitted.

These defendants having fully answered, ask that they may be discharged with their costs herein laid out and expended.

Hearing, Decree and Appeal.

Thereafter the appellee filed notice to set the cause down for hearing on the bill and answer, and in accordance therewith said cause was set down for hearing on the bill and answer, as is shown by pages 36 and 37 of the transcript of the record.

And on the 4th day of January, 1911, the cause was heard on the bill of complaint, and the answer of the defendants is as shown on page 37 of the transcript of the record.

And thereafter, on the 21st day of February, A. D. 1911, the court found the issues in favor of the complainant, appellee herein, and against defendants, these appellants, and entered its decree in accordance with the prayer of the bill of complaint setting aside and cancelling the deeds, and judgment mentioned in the bill and answer. This decree is shown, commencing on page 38 of the transcript of the record.

Thereafter, on March 14th, 1911, these appellants filed their petition for appeal, with supersedeas bond and assignment of errors, which petition for appeal was allowed by the court and assignment of errors ordered duly filed, and the bond approved, and an appeal allowed to the Circuit Court of Appeals for the Eighth Circuit, as is shown by the transcript of the record, commencing on page 41 and extending to page 48. Thereafter a citation to the appellee was duly issued and service of same was waived, as shown on page 48 of the transcript of the record, and the transcript was filed in said Circuit Court of Appeals on April 1st, 1911.

Thereafter said cause was heard by said Circuit Court of Appeals and on the 16th day of October, 1911, the said court made an order affirming the judgment of the Circuit Court, as is shown on page 57 of the transcript of the record. The opinion of the said Circuit Court of Appeals is shown, commencing on page 52 of the transcript of the record. Thereafter, by proper proceedings, the appellants obtained an appeal to this court, is shown by the transcript of the record, commencing on page 57. The transcript of the record was filed in this court on January 25th, 1912.

The record, in the condition in which it is presented to this court, brings to the attention of the court, as appellant understands it, these matters for determination, to-wit:

First. Was the demurrer of the appellants improperly overruled?

Second. Did the answer of these appellants, which for the purposes of this case must be taken as true, since the cause was submitted on bill and answer, set forth facts sufficient to constitute a defense to the cause of action sought to be set forth in the bill of complaint? If either of these contentions are answered in the affirmative, the judgment of the Honorable Circuit Court, where the cause was heard, and that of the Honorable Circuit Court of Appeals, should be reversed, and a decree ordered entered in favor of appellants.

SPECIFICATION OF THE ERRORS RELIED UPON.

The appellants in the above entitled cause, in connection with their petition for appeal herein, presented and filed therewith their assignment of errors, as to which matters and things they say that the decree entered hereon on the 16th day of October, A. D. 1911, is erroneous, to-wit:

I. The court erred in finding and adjudging that the United States Circuit Court for the Eastern District of Oklahoma had jurisdiction to hear, try and dispose of this case.

II. Because on the whole record in this case it is shown that the United States Circuit Court for the Eastern District of Oklahoma did not have jurisdiction to try or hear this case.

III. Because the original bill filed in this case does not state facts sufficient to entitle the appellee to relief granted, or to any relief whatever, and is wholly insufficient to support the decree entered in this case.

IV. Because the court erred in finding that the matters set forth in the answer of these appellants was insufficient to constitute a defense in favor of these appellants.

V. Because the court erred in finding that under the bill and answer the appellee was entitled to a decree.

VI. Because the court erred in holding that the judgment of the United States Court for the Northern District of the Indian Territory, sitting at Wagner, was insufficient to bind the appellee herein.

VII. Because the court erred in holding that the United States was not estopped by the judgment and proceeding by the United States Court for the Northern District of the Indian Territory sitting at Wagner, to deny the validity of the said judgment and its binding force upon the rights of the parties to the said suit.

VIII. Because the court erred in holding that the restriction against alienation contained in the patent of William Wea was not personal, but ran with the land.

IX. Because the court erred in not entering judgment in favor of these appellants on the bill and answer.

Wherefore the appellants pray that said decree may be reversed and that the appellants may have an adjudication and decree in their favor as herein specified.

BRIEF OF ARGUMENT.

All of the assignments of errors are grouped around two propositions:

1. Did the trial court err in overruling the demurrer, and the Circuit Court of Appeals in affirming that ruling?

2. Did the trial court err in entering a decree against these appellants on the facts alleged in their answer to this bill of complaint, and the Circuit Court of Appeals in affirming the decree?

The first proposition is covered by assignments Nos. 1, 2 and 3, and the various other assignments of error are embraced in the second proposition.

We desire to first take up the question of the sufficiency of the bill of complaint.

Location of Land and History of Allotment.

The land which forms the basis of this controversy is located in what was formerly known as the Peoria Reservation, in the Quapaw Agency, located in the northeast corner of the Indian Territory, now comprising a portion of Ottawa County, Oklahoma.

This former Peoria Reservation was formed from lands once owned by the Quapaw and Seneca tribes of Indians.

On February 23, 1867, a treaty was concluded between the United States Government upon the one part and various tribes of Indians upon the other part, and was confirmed by Act of Congress on October 14, 1868, Revised Indian Treaties, pages 839-848.

By this treaty the lands comprising the Peoria Reservation were ceded by the Senecas and Quapaws to the Government and by the Government granted and sold to the Peorias, the 22d Article of said treaty containing this clause:

> "The land in the second and fourth articles of this treaty, proposed to be purchased from the Senecas and Quapaws and lying south of Kansas, is hereby granted and sold to the Peorias."

This act itself vested the title to said land in said Indians, and no formal patent was needed.

There is in this treaty no restrictions or limitations on this grant to the said Indians. It was not conditioned upon their occu-

pancy of the land and was not limited to the time that it should be used by them, but it was an irrevocable grant, which vested the title to the land in said Indians.

The title having been once vested in them, could be by no subsequent act or acts taken away without their consent.

Jones v. *Meehan*, 175 U. S. 13.

When the General Allotment Act was passed, usually known as the Dawes Allotment Act, 24 Statutes at Large, page 338, February 8th, 1887, by special provisions contained in Section 8 of said Act, this reservation was excepted from the operation thereof, presumably for the reason that the lands had already been granted and sold to the Indians, and it was not thought that Congress could disturb their right, or title, or require an allotment in severalty without their consent.

On March 2d, 1889, a Special Act of Congress was passed, with the consent of these Indians, 25 Statutes at Large, 1013, providing for the allotment of the lands in this reservation in severalty to the various members of the tribe.

This Act made such provisions of the Dawes act as were not inconsistent with its provision, and were applicable to the conditions, apply to these Indians.

It will be seen, however, by an examination of these two Acts that they differ in many material and essential particulars. The Dawes Act provided that when any lands had been allotted in severalty that a so-called patent or certificate should issue showing *that the United States held the land in trust* for the allottee and for his heirs, and would so continue to hold it for a period of twenty-five years, at the end of which period *a final patent in fee simple should issue.*

Under the last, or Peoria Special Allotment Act, it was provided that when lands were allotted to any individual Indian *a final patent should issue at once* conveying the land to him, with no limitation or condition except that the patent should contain a clause providing that the lands so allotted should not be subject to alienation for twenty-five years from the date of the issuance of the patent therefor, and should be exempt from taxation, etc., for same period. This Act also provided that the laws of descent and partition of Kansas should apply to this land.

From this it will be seen that under the General Allotment Act the title to the land remained in the Government for a period of twenty-five years as a trustee for the allottee, when a final fee simple

patent should be issued, but under the latter a final fee simple patent should be issued at once upon the completion of the allotment.

Under the provisions of this last Act the lands in the Peoria Reservation were allotted and the lands in question were set off to one William Wea, and in pursuance thereof a patent was duly issued as provided in said Act, and the land so allotted and patented forms the subject of this controversy. (For copy of patent see page 12 of the record.)

Citizenship of the Allottee.

By an Act of Congress approved May 2nd, 1890, 26 Statutes at Large, page 99, the Peorias were expressly declared to be citizens of the United States, with all the rights and privileges as such.

By an Act of Congress of March 3d, 1901, all Indians in the Indian Territory were made citizens of the United States.

Again, on the admission of Oklahoma as a state on November 16, 1907, all Indians in the new state were made citizens thereof and of the United States.

Cooley's Constitutional Law, p. 270.
Boyd v. *Nebraska*, 143 U. S. 135, 36 L. Ed. 103.

In *Boyd* v. *Nebraska, supra*, Boyd, elected as governor, was the son of an Irishman, not naturalized, but *under the enabling act admitting Nebraska the son was qualified as a citizen of Nebraska*, and was held by the Supreme Court to be thus made a citizen of the United States. The court said:

> "Admission of a state on an equal footing with the original states, in all respects whatever, involves *the adoption as citizens of the United States of those whom Congress makes members of a political community and who are recognized as such in the formation of the new state with the consent of Congress.*"

In a more recent decision it was said:

> "We are of the opinion that *when the United States grants the privileges of citizenship to an Indian*, gives to him the benefit of and requires him to be subject to the laws both civil and criminal, of the state, which places him outside the reach of police regulations on the part of Congress, *that the emancipation from federal control thus created cannot be* set *aside at the instance of the Government without the consent of the individual Indian and the state.*"
>
> *In re Heff*, 197 U. S. 488.

From the above it appears that there can be no question but that the various members of this Peoria tribe had become citizens of Oklahoma and of the United States prior to the filing of the bill in this case, and that they were citizens when the deeds involved in this suit were executed.

Effect of Restrictions on Sale.

The appellants contend that the restriction against alienation, mentioned in the patent issued by the Government to the said Wm. Wea, in accordance with the provision of the Act of Congress above noted, were not such as run with the land, but were purely personal to the allottee, and died with him on the 23rd day of January, 1894, and that upon his death the land descended to his heirs, who had a right to sell and convey the same at such time, upon such terms, and under such circumstances and conditions as to them seemed best, and that when they executed a deed of conveyance to one John E. Rundell the title to the land in controversy passed from them to the said John E. Rundell, and was by him, through mesne conveyance, vested in the appellants in this case. And in support of this proposition we desire to call to the attention of the court the following:

The clause against alineation contained in the last paragraph of Section 1 of the Act of Congress, under which the patent was issued, is as follows:

> "The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of the patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation or forfeiture for a like period of years."

The Act provides that the above should be incorporated in the patent to be issued.

The patent actually issued in this case was in exact conformity with the requirements of the law, but whether it was or not, the question would have to be determined by the law itself as the issuance of the patent was a ministerial act, and anything inserted therein, not authorized by law, would be void.

Clark v. *Lord*, 20 Kas. 390-396.

What title did the allottee acquire under the patent? Was an equitable interest or fee simply estate created? In describing this kind of an estate this court has said:

"The title conveyed to Hurr by the patent was a fee simple. That is, it was all the title or interest in the lands. No one shared this title or had an interest in it and it descended or would have descended to his heirs. The restriction on his part to convey did not deprive the title of the character of a fee simple estate. An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever."

Libby v. *Clark*, 118 U. S. 250, 6 Supreme Court Reporter, 1045.

From this we concluded that the title acquired by the patent was a fee simple, but that there was a restriction on the power to convey same. What was the nature of this restriction? Was it one that run with the land or was it personal?

It has been held that these restrictions operate to place upon the Indian a personal disability similar to that the law places on a minor.

Am. & Eng. Enc. of Law, 2 Ed., Vol. 9, p. 127, Title Deeds, Note 4.

There are various restrictions against alienation provided by treaties with the different tribes of Indians, residing in what is now the State of Kansas that were enacted and construed prior to the enactment of the act involved in this case, and the construction placed on these restrictions will throw much light on this subject.

These restrictions are of three general kinds: One, providing that the land should not be sold by the Indian to whom allotted; Second, one providing that the land should not be sold by the allottee or his heirs; and Third, one providing that *the land should not be alienated for a stated period of time*. These three are illustrated by treaty with the Ottawas, the Peorias and Miamas, and the Wyandottes, which we will now notice.

The seventh article of the Ottawa treaty of 1862 (12 U. S. Stats. at L. p. 1240), provided that proper patents by the United States shall issue to each individual member of the tribe, and persons entitled, for the lands selected and allotted to them, in which it shall be stipulated that *no Indian*, except as herein provided, *to whom the same may be issued, shall alienate or incumber the land allotted to him* or her in any manner, until they shall have, by the terms of the treaty, become a citizen of the United States.

Under this article it was held that the lands were inalienable in the hands of the original allottee, but that the restriction on sale was personal.

Clark v. *Lord*, 20 Kas. 390.

The lands allotted to the Peorias and Miamis, under the provisions of the treaty of June 5th, 1854 (10 U. S. Stats. at L. 1092), and the Act of Congress in aid thereof, provided that the lands should not be alienated by the *allottee or his heirs*, etc., and should not be subject to levy, sale, taxation or forfeiture.

Under this treaty the *heirs being mentioned* as parties disqualified, of course could not make a conveyance, but even in this case it was held that the *restriction was personal*, and not a benefit that run with the land. In determining this question, Justice Brewer, formerly of the Supreme Court of the United States, then a distinguished member of the Kansas Supreme Court, asked this question, viz:

> "Did this exemption attach to the lands qualifying the estate and inuring to the benefit of all subsequent holders of the title, or was it simply a *personal* privilege of the Indian owner?"

And then answered it by saying it was purely a *personal* matter and not a limitation on the estate.

Comm'rs of Miami Co. v. *Brackenridge*, 12 Kans. 114.

It is true that the above question and answer were in relation to the restriction against taxation but that can make no difference for in *Commissioners of Miami Co.* v. *Brackenridge*, 12 Kas. 114, the same distinguished jurist said:

> "The two provisions are parallel. They stand side by side and are general in their terms. They should be construed similarly," *and then held them both personal.*

See also:

Farrington v. *Wilson*, 29 Wis. 383.

Under restrictions exactly similar to the above it was held by Justice McLain, in an opinion reported in the 4th McLain 82 that the restrictions were personal, *did not run with the land*, and that on the death of the allottee the land could be sold by order of the Probate Court for the payment of all debts of the deceased allottee.

A manuscript copy of this opinion was handed the Attorney General by the Secretary of War, who at that time had charge of Indian affairs, and his opinion requested in regard to the same, and the Attorney General after a careful examination of the same rendered an opinion, holding the same as was declared by Justice McLain, and saying that the restriction seemed to be *purely personal.*

4th Opinions Attorney General, 529.

When the Wyandotte lands in Kansas were allotted under the treaty of January 31, 1855, the tribe was divided into two classes, one known as "competent" and the other as "not so competent." The patent issued to those "not so competent" was to contain an express condition *"that the lands were not to be sold or alienated for a period of five years,* and not then without the express consent of the President of the United States first being obtained."

It was held in *Frederick* v. *Gray*, 12 Kas. 518, that as to the allottee this restriction was absolute, and did not terminate in the case of a minor on his becoming of age, or by any incompetent person becoming competent; that it was absolute, but *personal to the allottee.*

To the same effect *McMahon* v. *Welch*, 11 Kas. 280.

If these restrictions are a limitation on the title and run with the land, could a party who purchased with the consent of the Secretary of the Interior, where the restrictions have not been removed, make any valid sale? If these restrictions run with the lands, is not the exemption from taxation one that runs with the land also, so that the land could not be taxed no matter by whom owned? Was it intended that the land as an inanimate body was not subject to sale or taxation?

If the above is correct, then Wea had a title in fee simple with a restriction against Sale that was purely personal. This then brings us to the question as to whom the personal restrictions applied.

Under the first kind of restriction noted, it was held to apply to the allottee only as he only was mentioned.

Clark v. *Lord*, 20 Kas. 390.
Farrington v. *Wilson*, 29 Wis. 383.

Under the second kind of restriction noted, the heirs could not sell as they were specially included in the clause restricting sale. What was the intent under the third class where it was provided that the *land* should not be sold?

When the question as to whether under this kind of a restriction the heirs could sell, was presented to the Supreme Court of Kansas, it was contended that these restrictions were ones of sovereignty over the land, held and retained by the treaty power, and ran with the land, and were not mere privilges to the individual Indian. On the other hand, this was denied and the court in passing on the question found that the restrictions were *personal*, and that the *heirs could convey without let or hindrance*, using the

following language, viz.: "This restriction seems to be purely personal to the incompetent Indian, and does not affect the title of the land." Can it be possible that this restriction was intended to run with the land, and rest upon any person and every person who might afterwards own the same?

McMahon v. *Welch*, 11 Kas. 280.

In commenting on the above case, Justice Brewer said:

> "It was held in *McMahon* v. *Welch*, 11 Kas. 280, that these restrictions on alienation were personal to the individual, and not running with the land."

The exact provision in the above treaty with the Wyandottes, January 31, 1855 (10 Stats. at L., p. 1159), was that the lands allotted to a certain class should "*not be sold or alienated for a period of five years, and not then without the express consent of the President being first obtained.*"

An allottee under that Act died, and within the five years, and without the President's consent, his heirs conveyed the land. The Supreme Court of Kansas held (*McMahon* v. *Welch*, 11 Kas. p. 280), that this restriction was *personal to the allottee* and did not run with the land or apply to the heirs. This was again held by the same court in *Frederick* v. *Gray*, 12 Kas. p. 401, Justice Brewer delivering the opinion. The principle was recognized and enforced in *Oliver* v. *Forbes*, 17 Kas. p. 130, and *Krause* v. *Means*, 12 Kas. p. 267.

The same principle has been frequently discussed in connection with similar provisions exempting allotments from taxation, and a like conclusion reached by analogy in several cases, beginning with *Bluejacket* v. *Com., supra.*

A leading case on the same subject is that of *Armstrong* v. *Athens Co.*, 70 Ohio, p. 235, and affirmed in 16 Peters 281. The Act provided that the land of a university should be *forever exempt from taxation.* Part of the tract was subsequently disposed of and the purchaser sought to enforce the exemption, but the court held the exemption was personal to the university and continued no longer than the title remained in it, for whose benefit the exemption was made.

The clause against alienation used here is in almost the exact language that was used in the patents to the "not so competent" Wyandottes, and should receive the same construction. Where a law is passed similar to one that has a settled construction, it is always considered to have been passed with the intention that it shall receive the same construction as the previous Act.

In many of the treaties and Acts of Congress relating to kindred tribes before and since the passage of this Act, provisions restraining alienation specifically mention "the heirs." See, for example:

7 Stats. at L. 185, 191, 220, 297.
10 Stats. at L. 1161.
11 Stats. at L. 431, 583.
24 Stats. at L. 389.
26 Stats. at L. 989.
28 Stats. at L. 334.
32 Stats. at L. 641.

Is it not strange, in the face of the language used in these provisions, taken with the construction the courts had placed upon them and others, that if Congress had intended to restrict the alienation of this *land* in the hands of others than the allottee it would not have so expressly provided?

The estate of the citizen is not the land itself, but the status or relation which the law permits him to have toward the land. In passing these allotment Acts, Congress was not legislating in relation to the land itself, but was only determining the relation the allottee had toward the same. If it had been meant that the land as an inanimate body could not be disposed of for a period of twenty-five years, that at the end of that period it must be owned by the allottee, or by his heirs, the heirs would have an interest in it and would have created an estate tail which could not have been sold short of said period, even with the consent of Congress. This has never been understood to be the law. Congress has passed an Act permitting a portion of the allottees themselves to dispose of 100 acres of their allotments, and many sales have been made under this Act, and all consider the title so acquired as perfectly good. It is also understood that all the land so sold is subject to taxation under the laws of Oklahoma, although the Act authorizing the sale did not remove the restraint upon alienation. When the original allottee dies the land passes to his heirs, who take the same by descent and not by purchase. The heirs are not parties to the original grant and are not parties to any restraint on sale contained therein, and being citizens, have the full right to sell the lands as to them may seem just and proper.

The restriction on sale should not be carried beyond the very letter of the law. The free disposition of property is always fa-

vored, so much so that a restriction on alienation cannot be created in deed by individuals, but such restrictions are declared void.

> Am. & Eng. Enc. of Law, Vol. 13, 794, Limitation in Instruments.
> *Bauldin* v. *McDonnell*, 29 Mich. 84.
> *Anderson* v. *Corry*, 38 Am. Reports, 608.
> *Oxley* v. *Lane*, 38 N. Y. 325-330-351.

The solicitude of the United States for a home for the Indian allottee cannot extend beyond the grave. It proposed in this case to require him to keep it for twenty-five years, assuming he might live that long. (See *Pickering* v. *Lomax*, 145 U. S., p. 316). If Congress had intended to further restrict the alienation of the land, in the light of these authorities it would certainly have said so. Such an intention will not be inferred.

On the death of the original allottee the cause of the restraint ceases, and for this reason the restriction also ceases.

In *Hancock* v. *Trust Co.*, 103 Pac. (Okla.) 566, the court said:

> "Three hundred and twenty, or even 160, acres of land of the character referred to in this treaty and embraced within these nations is, in the county, a munificent competency. It is sufficient to abundantly protect every possessor of it, should he retain it, as long as he lives, and to leave a bountiful legacy to those who come after him. A citizen of this nation, with such a possession and resource, would never need feel want or distress. He would not become a charge or a subject of charity. But the reasons which prompted the lawmakers to protect him in this holding were altogether wanting when it came to the question of protecting those whose names were on the roll, but who died before receiving an allotment. If the heirs of those people were members of the tribe, they in their own allotment were amply provided for. If the heirs of those people were not members of the tribe there existed no necessity, occasion, or policy requiring any restriction on the sale of their lands.

It then descended to heirs under the general law of descent and distribution of Kansas (made applicable by Congress), not as an allotment or for their home, but as a fee simple estate in land. There was nothing to show whether the heirs would be Indians or white persons, or mixed. If Indians, they were protected from want by an *allotment* of their own; if not, the United States could have no interest in providing a home for them. There is no reason

for carrying the restriction beyond the time when it ceased to be an *allotment*.

The act under which this land was allotted (25 Stats. 1013) provides that the law of descent and partition of the State of Kansas should apply to same. The title passed under those laws without limitation. As said of a similar provision in *Hancock* v. *Trust Co., supra*:

> "Another thought which leads us to this same conclusion is that Section 22 provides for the allotment in the name of the deceased person, whose name was on the rolls, of the land to which he would have been entitled, which, with his share of the other property, descended to his heirs, not under any tribal or federal act containing recognition of the terms of this treaty, but it is provided that the heirs shall take under the terms of a separate and specific statute, to-wit, the laws of descent and distribution as provided in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas. These laws contain no restriction on alienation, and the rights of the heirs under them, being recognized by this treaty, carried the property to them free, clear, and unincumbered."

This act in providing that the law of partition of the State of Kansas which provides for sale of the land and division of the money shows that it was not intended to restrain sale beyond the life of the original allottee.

In view of other legislation upon the subject, and particularly the provisions of the treaty with the Wyandottes, a neighboring tribe, the language of which is similar to the one under consideration, except that the period of limitation is not so long, and which had received a settled construction (*McMahon* v. *Welch, supra*), this would seem to be a proper case to invoke the presumption that Congress was familiar with this settled construction and intended the language here used to receive a like construction and interpretation.

By an Act of Congress approved May 2, 1890 (26 Stats. at L. 99), the Peorias were expressly declared to be citizens of the United States, with all the rights and liabilities as such; in other words, they are competent Indians, can contract and be contracted with the same as other persons, can buy and sell land without any restriction whatever, and can sell the Peoria lands *inherited by them*, unless the restriction runs with the land, and all the decisions hold that it *does not, but is purely personal;* hence, their right, it seems, is beyond dispute.

Right of the Government to Maintain this Suit.

In determining the question as to whether or not the United States can maintain this bill in its own name, we will have to be guided by the same laws that govern in determining the right of any individual to institute or maintain a suit. There is not vested in the General Government, as such, the right to institute or maintain any kind or character of a suit that its officers may desire, unless it is based upon some special right or authority, and in determining what right or authority the United States has to maintain any particular suit, we must do it in the same manner as in determining the right of any other plaintiff to so do. This is specifically held to be the law in *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, wherein it is stated as follows:

> "But we are of the opinion that since the right of the Government of the United States to institute such a suit depends upon the same general principles which would authorize a *private citizen* to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the Government must show that, like the private individual, it *has such an interest* in the relief sought as entitled it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it is a question of fraud which would render the instrument void, *the fraud must operate to the prejudice of the United States;* and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligations to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

Viewing this matter in that light, it is appellant's contention tha this suit cannot be maintained in the name of the United States, unless it shall appear that it is brought by it as a guardian of the allottee, or his heirs, or by reason of some interest that the Government may have in the land itself, either as owner, or as trustee for the allottee, or his heirs, or was obligated so to do, and that if it is found that the guardianship of the Government over the Indians had ceased before the bill was filed and that it has no interest as owner in the land in controversy and does not hold the

same in any manner as a trustee for the allottee or his heirs, and was not obligated to bring the suit, that the demurrer should have been sustained and the bill dismissed. These questions we will take up separately.

Had the Guardianship of the Government Terminated?

It is contended by these appellants that when the allotment of the above land had been made, and when the allottee became a citizen of the United States, that the guardianship of the Government over him ceased, and he became vested with all the rights, privileges and immunities of other citizens, including the right to institute and maintain a suit or desist from doing so, as he might desire; to employ counsel to represent him in any litigation involving his rights, and to have the absolute control of the litigation, and that guardianship and citizenship are inconsistent, one with the other.

Sustaining this contention, we desire to call to the attention of the court the following authorities:

U. S. v. *Boss*, 160 Fed. 132.

In the above case discussing this question, Judge Marshall made use of this language:

> "The effect of this provision was to make every Indian to whom an allotment of land had been made in conformity with the provisions of the Act, a citizen of the United States, and, of necessity, a citizen of the state in which he resided and subject to the laws thereof."
>
> *Matter of Heff*, 197 U. S. 488.

> "The Supreme Court of the United States determined in the case above cited that the dependent status of the Indian ceased by virtue of the Act of February 8th, 1887, on the allotment of land in severalty to him, and that thereafter his former condition of tutelage afforded no basis for police regulations by the National Government, within the boundaries of a state."
>
> *Ex parte Savage*, 158 Fed. 205.

In this case Judge Pollock made use of this language:

> "Since the decision by the Supreme Court in the case of *In re Heff*, 197 U. S. 488, it cannot be doubted, I think, under Act of Congress, February 8, 1887, when Indians have been allotted in severalty and have received their patent, they are no longer wards of the Government, but are citizens of

the United States and of the state in which they reside, and are entitled to all the rights guaranteed to all citizens of such state.

In re Celestine, 114 Fed. 551.

In this case Judge Hanford, in discussing the right of the Government to institute a suit in behalf of an Indian who, by receiving an allotment, had become a citizen of the United States, said:

"Congress has relieved the Government of responsibility in such cases as this, by conferring the rights of citizenship upon Indians to whom allotments of land have been made. Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the negroes in this country since their enfranchisement by the Fifteenth Amendment to the Constitution, of whom the Supreme Court, in an opinion written by Justice Bradley, has said:

'When a man has emerged from slavery and by the aid of beneficent legislation has shaken off the inseparable concomitant of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.'

Civil Rights Cases, 109 U. S. 25, 3 Sup. Ct. 27, L. Ed. 844.

"In view of this status as citizens, I consider that the mother and step-father of this child should be permitted to seek an adjudication of their controversy with respect to her in the state court which has jurisdiction of such cases. A judgment of dismissal for want of jurisdiction will be entered."

We desire to call also the attention of the court to the decision referred to above as follows (*In re Heff*, 197 U. S. 488):

U. S. v. *Dooley*, 151 Fed. 697.

This was a suit brought to obtain similar relief to that sought in the case at bar. It was objected by the defendants that the U. S. did not have jurisdiction and the basis of that contention was identical with the one in this case. It being contended, first, that it could not be maintained as a guardian, nor, second, as a trustee. This case is peculiarly appropriate to the facts of our case and draws out quite sharply the distinction that we have sought to make in the manner in which these allotments were made.

The effect of this decision was to hold, first, that it could not be maintained upon the theory that the Government was acting as a guardian of the Indian, but that on the second proposition, as the land had been allotted under the General or Dawes Allotment Act, and a certificate only had been issued showing that the Government held the legal title to the land in question for the Indians, and that as that trust had not expired and no final patent had been issued, that it could be maintained as such trustee.

The conclusion from the opinion must inevitably be drawn that except for the fact that the Government had retained a legal title to the land for the Indians that the suit could not have been maintained on either theory.

Judge Whitsen, in determining this case, makes use of this language:

> "The contention that the relation of guardian and ward exists between the complainant and the allottee cannot be sustained, for the statute terminated that relation, at least insofar as it affects her personal acts and political status as an Indian. Such was the holding in the *Matter of Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. The argument that the same relation exists between the Government and the Indians since as before the passage of the Act was answered by Mr. Justice Brewer in delivering the opinion of the court, as follows:
>
> 'But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national and therefore state citizenship, the benefit and burdens of the laws of the state, may at any time repudiate this action and resume its guardianship, and prevent the Indian from enjoying the benefits of the laws of the state, and release him from obligations of obedience thereto. Can it be that, because one has Indian and only Indian blood in his veins, he is to be forever one of a special class over whom the General Government may in its discretion assume the rights of guardianship which it had once abandoned, and this whether the state or the individual consents? We think the reach to which this argument goes demonstrates that it is unsound.'
>
> The right to maintain the suit must, therefore, rest upon other grounds than that of the relation of guardian and ward, but it does not follow that because such status has been abolished that the Government is remediless. The authority rests upon another well-defined principle. The complainant

is still vested with the legal title to the land, which, to quote from the Act, it holds:

'In trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state or territory where such land is located. And that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charges or incumbrances whatsoever.'"

See also:

U. S. v. *Auger*, 153 Fed. 671.

From the above, these appellants think that this suit should not be permitted to be maintained or prosecuted by the Government in its own name on the theory that it is a guardian for the allottee or for his heirs.

Can Suit be Maintained as a Trustee?

Under the treaty above referred to the title to the land comprising the Peoria Reservation vested in the Peorias. The United States retained no interest or right therein.

When the land was allotted, the patents issued conveyed fee simple titles to the allottees. Instead of protecting the Indians by holding the lands in trust a clause preventing alienation was inserted in the patent. That fee simple titles were created is clearly shown by the case of *Libby* v. *Clark*, 6 Sup. Reptr. 1045, 118 U. S. 250, wherein the court, in describing the kind of an estate created by a similar instrument, said:

> "The title conveyed to Hurr by the patent was a fee simple. That is, it was all the title or interests in the lands. No one shared this title or had any interest in it and it descended or would have descended to his heirs. The restriction on his part to convey did not deprive the title of the character of a fee simple estate."

This same principle is again set forth in *U. S.* v. *Kopp*, 110 Fed. 164, wherein, among other things, it is said:

> "Formerly the National Government had the supreme and absolute power and right to control the Indians by reason of their condition as dependents and wards of the nation, by reason of its title in fee to all the lands reserved for their use and occupation, and by reason of the plenary power vested in Congress to make laws for all the people in the territories.

But, step by step, all these controlling powers have been devested. First, the patents issued by the President pursuant to the treaty made with the Indians passed the title in fee from the United States to the patentees, subject only to the restrictions and conditions subsequent expressly declared in said treaty. No estate or reversionary interest in the patented lands is reserved or now held by the United States. The restrictions prevent alienation of the lands until authorized by a law of the state to which Congress must consent, otherwise than by leases for terms not exceeding two years. The conditions subsequent are that, for specified causes, any patent may be by the President canceled and the land so forfeited may be assigned to other Indians, or sold for the benefit of all the Indians of the tribe in common. Instead of reserving the right to terminate the estate by a re-entry for breach of the condition, each of these patents creates a power in the President to re-assign the land or sell it. This power is not inconsistent with the complete investure of title in the patentees. Chancellor Kent says: 'Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated. * * * So long as these estates upon subsequent conditions continue unbroken, they remain in the same situation as if no such qualification had been annexed.' 4 Kent Comm. (13th Ed., 126. By this step the Government lost entirely the power to control the use of the land. The second step whereby Indian proprietors of land were made citizens deprived the Government of the power to coerce such Indians into making or annulling contracts, or of molesting persons upon their premises by their license, when not interfering with the operations of the Government or violating any national law. The rights, privileges and immunities of citizenship in this country include, among others, the right 'to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property.' These are fundamental rights, and of the essence of civil liberty. Civil Rights Cases, 109 U. S. 22, 3 Sup. Ct. 18, 27 L. Ed. 835. The third step transferred from Congress to the state government the power to preserve peace and good order, and regulate the making of private contracts, and the use and descent of private property, within the state."

To these might be added many more holding that the entire interest in the land was conveyed to the allottee, but these are sufficient to show the rulings of the court.

The Government, under the Dawes Act, agreed at the end of the trust period of twenty-five years to convey the land by a final patent free from any incumbrance. Under this agreement

a suit might be maintained by it to remove incumbrances in order for it to comply with its obligation. No such obligation exists in this case. A final fee simple patent has been issued conveying the land free from incumbrances of any kind, and the same condition exists as will exist under the Dawes Act after the trust period has expired and final patent free from incumbrances has issued.

When the Government issued the final patent in this case it completed its obligations in full; retained no interest in the land as trustee or otherwise, and terminated its obligation to the Indian in relation to this land; and then ended its guardianship by making him a citizen with a right to protect his interests as to him appears best, and cannot again assume control over him or his land, any more than it can over any other citizen or his property.

The case of *McKay* v. *Kolyton*, 204 U. S. 458, shows clearly upon carful consideration that it is only in cases where the title is still held in trust that any right to maintain a suit of this kind exists. That decision also shows that when the title is so held, which is not the case here, that the state courts have no jurisdiction of any suit in relation to the land. The reasoning and effect of this case is set forth by the Honorable Commissioner of Indian Affairs, in his annual report for 1907, at page 69, as follows:

> "Briefly, the course of the argument was: That the case of the *United States* v. *Rickert*, 188 U. S. 432-435, settled that the United States retained such control over allotments as would cause allotted lands to inure *during the trust period* for the sole use and benefit of allottees; that in the Smith case (194 U. S. 408) it was observed that prior to the passage of the Act of August 15, 1894 (28 Stat. L. 286), 'the sole authority for settling disputes concerning allotments resided in the Secretary of the Interior,' and consequently controversies necessarily involving a determination of the title and incidentally of the right of possession of Indian allotments *during the trust period* were not primarily cognizable by any court, either state or federal; that the Act of 1894 which delegated to the courts of the United States the power to determine such questions, cannot be construed as having conferred upon the state courts the authority to pass upon federal questions over which, prior to the Act of 1894, no court had any authority; that the purpose of the Act of 1894 to continue exclusive federal control over the subject was manifested by its command that a judgment or decree rendered in any such controversy should be certified by the court to the Secretary of the Interior; that by this provision, as pointed out in the

> Smith case, the United States consented to submit its interest in the *trust estate* and the future control of its conduct concerning it to the decrees of the courts of the United States, a power which such courts alone could exercise."

If this suit could be maintained on the trust theory, then all *suits* involving title to *any lands* in that portion of Oklahoma formerly comprising the Indian Territory would have to be brought in the federal courts, until the last restriction on sale had expired, and the state courts would have no jurisdiction of any of them. Such is certainly not the law.

It has been the universal custom for the state court to try suits in relation to these lands.

Sec. 2296, Revised Statutes of the U. S., on the subject of ordinary homesteads, provides:

> "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

Under this section would it be contended that after the issuance of final patent to a citizen, that the United States should interfere to stop any threatened sale under execution for a debt created prior to date of patent? On the contrary, would it not be considered that the Government had done its whole duty when it had issued the patent, provided a protection to the patentee, and a court to inforce it? That is in principle this exact case. The United States has parted with the entire interest in the land, has provided a clause against alienation to protect the allottee against loss of same, made him a citizen of the United States and of the State of Oklahoma, and provided courts for him to enforce his right. What further should or could be done?

In this suit as it now stands these appellants have everything to lose and nothing to win.

The Indian who it is claimed by the bill owns the land not being a party, either in person or by guardian, is not bound by any decree that might be entered.

A suit to be properly instituted should be in such condition as to be mutually binding on both of the parties interested in the subject of the litigation. This is illustrated by such cases as

In re Iowa, etc., Com. Co., 6 Fed. 801.

Appellants respectfully submit that the demurrer should have been sustained, and that the Circuit Court of Appeals erred in not so holding.

II.

On the Bill and Answer the Decree Should Have Been for Appellants.

The cause was submitted to the court for final determination upon the bill and answer. If on this state of the case the answer sets forth facts which, taken in connection with the admissions of the bill, are sufficient to constitute a defense, then a finding and decree should have been entered in favor of these appellants.

The facts as they stand admitted for the purposes of this case are in substance as follows, to-wit:

The land in controversy, and fully described in the bill, was originally allotted to one William Wea, who was a member of the Peoria tribe of Indians, under and by virtue of the provisions of an act of Congress approved March 2, 1889, entitled, "An Act to Provide for Allotment of Land in Severalty to the United Peorias and Miamis in Indian Teritory, and for other purposes." (25 St. 1013.) Pursuant to the allotment a patent in due form was issued by the United States to the said William Wea in exact accordance with the terms and provisions of said act of Congress. After having received said allotment, and after having entered into possession thereof, the said William Wea departed this life and left surviving him, as his sole heirs, his cousins, Charles Stanley, Orillo Keno Mohawk and Mary Bigknife, to whom said lands descended. That after the issuance of the patent to the said lands, and prior to the death of the original allottee, the members of the Peoria tribe were, by an act of Congress on May 2, 1890, being 26 St. at Large, page 99, expressly declared to be citizens of the United States and granted all the rights, privileges and immunities as such, and at said date the guardianship (if any guardianship of the United States over said members of said tribe ever existed) ceased and terminated, and the individual members thereof became and ever thereafter have been citizens of the United States, with all rights and privileges as such. That after the title to said land had become vested in said heirs of the original allottee, and on the 2d day of December, 1897, the said heirs entered into a contract in writing with one John E. Rundell, by the terms of which they agreed to convey to said John E. Rundell the land here in controversy for a consideration of One Thousand Dollars ($1,000), Twenty-five Dollars ($25.00) of which was paid in cash and the balance to be paid at a future date. By the terms of the contract, the said John E. Rundell bound himself to take

said land upon said terms and make said payments therefor. That subsequently the said John E. Rundell refused to carry out said contract, and thereupon the said heirs instituted a suit in equity in the United States Court for the Northern District of the Indian Territory, sitting at Wagoner, in said district, against the said John E. Rundel, praying in said suit for a specific performance of their said contract of sale, said suit being commenced on March 2, 1898; and by reference to the bill it will appear that at the time of instituting said suit the said heirs tendered to the said John E. Rundell, in said suit, and in said court, a deed to said real estate, which had been previously duly executed by them, and asked that said deed be decreed to convey a good title in fee simple to said John E. Rundell, and that he be required to accept the same and to pay to them the unpaid balance of the purchase money, to-wit, Nine Hundred and Seventy-five Dollars ($975.00).

It will further appear from the answer that at said time the said John E. Rundell was a citizen of the United States and all of the parties to the said suit were citizens of the United States and resided in the Northern District of the Indian Territory, and that the land involved in said suit and in this controversy was situated in said Northern District, and that said United States Court had jurisdiction of the persons and of the subject matter of the said suit and of the right to decide and determine the issues involved therein; *and that the said suit was brought in good faith and so prosecuted for the purposes of determining the rights of the respective parties.* That in said suit there was tendered to said John E. Rundell a deed, duly executed by said heirs, conveying to said John E. Rundell the said land, and that same was tendered as full compliance by the plaintiffs of their part of said contract; and it will apear by reference to the bill that defendant John E. Rundell appeared to said suit and filed his answer therein, admitting the execution of the contract set out in plaintiffs' petition, but denying that the plaintiffs therein were the sole heirs of William Wea, deceased, original allottee, and further denying that the said plaintiffs, at the time of filing said petition and making said contract, had the right to sell and convey said lands, and asked to be relieved and discharged of the obligation of accepting the land tendered him, and of paying the balances due from him under the contract of purchase. And it further appears from said bill and answer that thereafter a hearing was had in said cause in the said court, and that said

hearing resulted in a finding and judgment in favor of the plaintiffs therein, wherein it was adjudged and decreed that the contract so entered into between plaintiffs and defendant therein was a good, valid and subsisting contract, and that the *deed* tendered to the defendant conveyed to him a legal title to the said land, and that plaintiffs had the right to convey the land in controversy, and directing that the deed be delivered to him as full compliance by said plaintiffs of their part of said contract, and ordered and adjudged that said plaintiffs have and recover from the said John E. Rundell the sum of Nine Hundred and Seventy-five Dollars ($975.00) and costs of suit as payment in full of said premises. And that thereafter the said John E. Rundell paid said judgment, together with the costs and interest thereon in full and accepted said deed and placed it upon the records. And it further appears that the said deed so accepted by the said John E. Rundell against his answer and against his request to be relieved from his contract, and by compulsion of the United States Court, is one of the deeds sought to be set aside in this proceeding, and the judgment requiring said John E. Rundell to accept said deed is the judgment sought to be vacated, which judgment it is admitted was entered in a suit instituted and prosecuted in good faith. The remaining deeds sought to be set aside are conveyances whereby the title so acquired by said John E. Rundell was transmitted to the other defendants.

(A) Organization and Jurisdiction of Courts in Indian Territory on March 1, 1899, (25 St. at Large 783). The First Court for the Indian Territory Was Established by an Act of Congress.

Section 1 of this Act provides:

> "A United States Court is hereby established whose jurisdiction is extended over the Indian Territory bounded as follows, to-wit (giving boundary)."

Section VI prescribes the jurisdiction in civil cases. The portion bearing on the point in question is as follows:

> "That the court hereby established shall have jurisdiction in all civil questions between the citizens of the United States who are residents of the Indian Territory, and between citizens of the United States or any state or territory therein, and any citizen or any person or persons residing or found in the Indian Territory, and when the value of thing in controversy or damage or money claimed shall amount to $100.00

> or more; provided that nothing herin contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood only."

This Act gave the court thus established a general equitable jurisdiction. In the case of *Thompson et al.* v. *Rainwater,* 49 Fed. 406, the Circuit Court of Appeals said:

> "In cases of equitable cognizance of which the court has jurisdiction under the Act of Congress of March 1, 1899, it is its right and duty to apply those general rules of law which are usually recognized and enforced by courts of equity."

On May 2, 1890 (25 Stats. at Large, 784), an act was passed continuing the jurisdiction of the United States Court as originally constituted and increasing its power. This act was the one in force when the judgment involved in this case was rendered. And in relation to the jurisdiction of the court after that amendment, in the case of *McClellan* v. *Pycatt,* 66 Fed. 843, the Circuit Court of Appeals said:

> "Under the Act of March 1, 1899, which created a United States Court in the Indian Territory, that court was empowered to grant such relief in equity in causes within its jurisdiction as was consonant with the established rules and practice of chancery, and this authority was confirmed to it by the subsequent Act of May 2, 1890."

Under these decisions it clearly appears that the United States Court in the Indian Territory had a general equitable jurisdiction, and a right to try cases of the character of the one in which the judgment involved in this case was rendered.

The court also had jurisdiction in all cases where the parties on one side were citizens of the United States and the parties on the other side were Indians who had become citizens, or who had not become citizens, for that matter; the only limitation being the residence of the parties in the district in which the suit was brought. See *Davenport* v. *Buffington et al.,* 97 Fed. 237.

Under the above it appears that the United States Court at Wagoner that rendered the judgment involved in this case had jurisdiction of the parties to the suit, and of the subject matter, that is, a right to try suits of the kind and character that was being presented to it, and having full jurisdiction of the parties and subject matter, it is the contention of the defendants herein that its judgment was binding and conclusive upon all parties. The court was established for the very purpose of settling any disputes that might arise between residents of the district in which it was held.

(B) Right of Original Plaintiffs to Sue.

As will be seen by the answer in this case all of the plaintiffs to the suit in which the judgment sought to be set aside was rendered, had been made citizens of the United States prior to the institution of that suit, so that they had a right to resort to the United States Court to have their controversy settled.

(C) Res Judicata.

The judgment of the United States Court at Wagoner is binding upon the parties whether it was decided correctly or incorrectly. That a judgment cannot be attacked on account of an error in judgment in rendering the same needs no citation of authorities to support it. By the above the defendants do not desire to be understood as admitting that the judgment sought to be set aside was improperly rendered, or that the judge in rendering the same made an error in fact, or law, but desire simply to be understood as insisting that having had the matter before it for determination, and having decided the matter, the question as to correctness or incorrectness of the court's finding is forever settled.

The law provides only three methods by which an erroneous judgment can be vacated or set aside.

First, by the court rendering the judgment, during the term of court at which it was rendered, upon motion for new trial or arrest, or other proper application.

Second, by appeal or writ of error.

Third, by a suit in equity to set aside the judgment for fraud. The fraud that would give such equitable jurisdiction must be *fraud in obtaining the judgment.* But it is admitted by the pleading here that there was no fraud in procuring the judgment, but that it was an honest controversy prosecuted and defended in good faith.

These propositions are fundamental and require no authorities cited to support them.

(D) The Case of Buffalo v. Goodrum, 162 Federal, 817, is Not Applicable to This Case.

These defendants insist that the decision of the Circuit Court of Appeals in the case of *Buffalo* v. *Goodrum* is not an authority against their contention in this case, for the following reasons, to-wit:

(1) The judgment in the Goodrum case, as shown by the opinion, was rendered in a proceeding fraudulently instituted and prosecuted.

The proceeding in this case was instituted and prosecuted in good faith.

(2) The proceedings in the Goodrum case, as shown by the opinion, were instituted to evade the law against alienation, and to procure in an indirect manner that which could not be procured in a direct manner.

The proceeding in this case was not instituted to evade or circumvent the law, but in good faith to determine the actual rights of the contending parties.

(3) In the Goodrum case the parties simply agreed that their rights might be determined by a submission to the court, which agreement was held to be invalid.

In this case there was no such agreement. The defendant was brought into court, protested against carrying out the contract, and was against his will forced to take the land and pay the purchase money.

(4) In the Goodrum case the agreement to submit the matter to the court for determination was not in compliance with the law itself, and was lacking in such jurisdictional matters (as is shown by the opinion) that the court did not acquire jurisdiction of the subject-matter nor of the parties and the judgment rendered therein was for that reason, absolutely void and of no force and effect.

In this case the suit was instituted in good faith, and an actual controversy existed and, as shown by the bill and answer, and exhibits, was prosecuted in the usual and ordinary manner, being submitted to the Master in Chancery, who heard the evidence, made his report to the court, which report was by the court confirmed and decree regularly entered.

(5) In the Goodrum case the court simply passed upon the validity of the contract of sale and did not actually adjudicate any of the rights of the parties to the deed. Its proceedings simply amounted to authorizing an Indian to make a conveyance which the Circuit Court of Appeals held it had no right to do.

In the judgment sought to be set aside the actual rights of the parties and the validity of the conveyance were passed upon by the court.

(6) The decisions cited in the Goodrum case, holding that the court had no right to authorize an Indian to convey, as was done in that case, are sufficient to uphold that ruling, but are not sufficient to uphold a ruling that a judgment of a court determining the validity of a conveyance between parties thereto is invalid. The decisions cited were where land had been condemned by the United States Government and sold on account of the owner giving aid to the Southern Confederacy. A judgment of condemnation, which was a proceeding *in rem*, appeared to direct the sale of a fee simple title, while the Act only authorized a sale of a life interest, and it was held that the decree only authorized a sale of the life interest and not the fee simple title. Of course that ruling was correct, as the court was only given power to render that kind of a decree, and that would be applicable as preventing the court from exercising authority to remove restrictions or authorizing Indians to convey lands in violation of restrictions. But it would not be an authority against the jurisdiction of the court in determining the validity of a conveyance tendered in an equity proceeding pending before it wherein the rights of the parties under the instrument were asked to be adjudicated and settled.

We know of no case wherein it has been held that the judgment of a court having jurisdiction of the class of cases being passed upon is invalid because of any error of the court in rendering the same.

(7) The Goodrum case itself is an authority against the contention of the Government. It was originally instituted in the United States Court for the Northern District of the Indian Territory on behalf of Indian claimants against citizens of the United States to determine the right and ownership of an allotment of land in said district, and, after being tried in the District Court, went on appeal to the Court of Appeals of the Indian Territory and from there to the Circuit Court of Appeals. If the District Court that first heard that case had jurisdiction of the parties and of the subject-matter and the right to determine the validity or invalidity of Goodrum's title, then the court at Wagoner that rendered the judgment involved in this case had jurisdiction and right to determine the matter presented to it, and the fact that the United States Circuit Court of Appeals passed upon the case upon its merits shows conclusively that they considered that the lower court had jurisdiction, for if the lower court had no jurisdiction, the Court of Appeals would have had no jurisdiction, as its right is derivative and dependent upon that of the lower court, and it would have had to dismiss the appeal.

We do not understand that the Goodrum case intended to hold that the United States Court for the Indian Territory in a case properly pending before it would not have a right to determine the validity or invalidity of any contract of sale of real estate situated within the district. If the court had the right to hear any controversy in relation to the validity of land titles, of course the validity of its judgment could not be made to depend upon the question as to whether it held the title valid or invalid.

(8) In the Goodrum case the parties by their contract agreed that the question of the right of the Indian to make a conveyance might be submitted to the court. If the court decided they had a right to convey, they were to make a deed; if the court decided they had no right to convey, they would not make any conveyances. The vendee in the contract, without the knowledge or consent of the other parties, submitted the question to the court and in no way complied with any rule of court or statute authorizing such a proceeding, and the whole amounted to no more than asking the opinion of the man who happened to be judge of that court as to the validity of their contract or right of the Indian to make a valid deed, and in no way invoked the judgment of the court upon a controversy between the parties in a matter, and with respect to parties over which the court had jurisdiction. And the court had no right to, and did not attempt to, adjudicate anybody's rights in the Goodrum case, as shown by reading the opinion. The decision of the Appellate Court was to the effect that there was no actual controversy in court, and that the court had no jurisdiction to decide with regard to the matter that was submitted, and that its decision was *coram non judice*.

In the Goodrum case, after this futile effort to submit the controversy to the court and getting the court's opinion that the Indians could convey good title, they made a conveyance. Then afterwards Buffalo (an heir of the grantor) brought suit against Godrum in ejectment, and it is this last case that has been adjudicated.

We apprehend, however, that the judgment of the court in this ejectment case of *Buffalo* v. *Goodrum* would be a final determination of the issues involved therein, and that it would have been so had the decision been the other way, as there was an actual controversy existing between the parties which was submitted to the court for determination, and if that judgment was a valid, binding and subsisting judgment conclusive between the parties, then also is the judgment sought to be set aside in this case.

(E) Estoppel.

The facts disclosed in the bill and answer constitute an equitable estoppel against the Government; and show that it is inequitable and against good conscience to maintain this action.

We find the books full of such expressions as this, "resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel."

State of Indiana v. *Milk*, 11 Fed. Rep. 389.
Commonwealth v. *Andre*, 3 Pick. 224.
Commonwealth v. *Pejepscup Proprietors*, 10 Mass. 155.
State v. *Bailey*, 19 Ind. 452.
Cohn v. *Burnes*, 5 Fed. 326.
Gibbons v. *U. S.*, 5 Cir. Ct. 416.
Federal Cases 16920.

"When the government seeks its rights at the hands of a court, equity requires that the rights of others as well should be protected. *Carr* v. *U. S.*, 98 U. S. 438, 25 L. Ed. 209. The Government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel applies to the Government as well as to individuals. *Chope* v. *Detroit Plank Road Co.*, 37 Mich. 195, 26 Am. Rep. 512; *Commonwealth* v. *Andre*, 3 Pick. 224.

This case was decided by the United States Circuit Court of Appeals for the 7th Circuit.

U. S. v. *Stimpson*, 125 Fed. Rep. 907, l. c. 910.

See also:

U. S. v. *Wagon Road Co.*, 54 Fed. Rep. 811, local citation.
Pengra v. *Mung*, 29 Fed. Rep. 830, loc. cit. 836.
State v. *Director of School District*, 108, 88 N. W. Rep. 751.
The Siren, 7 Wallace 155, local citation.

In this case the United States Government through its judiciary and its process regularly issued from a court, and having jurisdiction of the subject matter and the parties, forced the defendants' grantors into court and by the exercise of the full power of the Government, took from them their money and forced them to take this title. It is admitted by the bill and answer that these persons were seized of the whole title. If the Government can

maintain this action and these deeds are set aside it would be for the benefit of these very parties who invoked the powers of the Government to force defendants' grantors to accept this title and pay their money to them. It would seem that if there ever was a case where the Government would be estopped from now saying that the deed conveyed no title, and that these conveyances should be set aside without even offering or requiring the parties for whose benefit this suit is brought to tender or refund the money paid as being inequitable and unconscionable, it would be this case.

If it is contended that the suit is not for the benefit of the Indian who conveyed this title, but is for the benefit of the Government, then the reasoning in these cases applies with additional force, because it is the duty of the Government to be upright and just with all of its citizens, and it is the duty of the Government to protect the rights of the white man as much as the Indian, and if this suit is for the benefit of the Government and only to protect its own interest and integrity it certainly cannot be claimed that that purpose would be subserved by doing such a gross injustice as would result to these defendants by setting aside their deeds; when it is not even suggested in the bill and answer that the money that the Government forced the defendants' grantors to pay for this land was in the least inadequate, or that there was the least injustice or lack of equity in the dealings with the original parties.

Further, if the contention of the Government is correct that this judgment and the deeds are absolutely void, then there is no equity in this bill; because equity will not concern itself with the futile act of declaring a thing void when it is already void; and it will only entertain jurisdiction to remove a cloud from the title when there is a cloud to be removed; and that can only be in a case where the conveyance apparently makes a good title and requires evidence in court to show that it is not good. But if the Government's contention here is correct, then these proceedings, the judgment and conveyances are all absolutely void on their face and require no evidence to establish it and constitute no cloud on the title. There is nothing for a court of equity to do.

This proposition is fundamental.

(F) Judge Springer's Decision Was Right.

The appellants in this case contend that the decision of Judge Springer, sought to be set aside by the Government in this case,

was not only fairly obtained, and one that cannot be attacked in this manner, but that the decision rendered by him correctly stated the law, and that if it was an open question, that the issues presented in that case were correctly decided, and the right decision rendered therein. This is already covered under the argument of the right of the heirs to convey.

As To the Court of Appeals Finding.

In regard to the opinion filed in this case, in Circuit Court of Appeals, by Judge Marshall, appellants desire to make the following observations:

That opinion is based entirely on the case of *Goodrum* v. *Buffalo*, 162 Fed. 817, the Debs case, 158 M. S. 564, and *United States* v. *Allen*, 179 Fed. 13.

1. The Goodrum case was a suit instituted by the Indians (Buffalo), in their own right, in the very same court in which the judgment in this was rendered, which is relied on as an estoppel. The Goodrum case therefore necessarily holds that that court had jurisdiction of the subject matter of a dispute between the Indian heirs of an allottee and the purchaser of a title from them, subject to the restriction, in the hands of their ancestor (the allottee). If it had jurisdiction then its decree, unappealed from, is a final adjudication and settlement of the rights of the parties.

2. The Goodrum case does hold that the restriction against alienation runs with the land, and follows it in the hands of the heirs of the allottee. But on this question it stands alone, and is not supported by authority; and in fact is opposed to all the adjudicated cases on the subject.

Being thus opposed to the adjudications on this question, and being the opinion of a District Judge sitting in the Court of Appeals, we submit that it is not authority in this court. We further suggest that the former adjudications were interpretations of the identical language used in the treaty and patent in question, and inasmuch as this language had received a judicial interpretation, as used in Treaties, Acts of Congress, and Patents, relating to Indian lands, that we cannot escape the conclusion that Congress, in the Acts, and Patent in question, intended that the language so used should bear the same import, and hence the same effect, as that which the courts had given to it as found in former Acts of Congress, and used in Patents issued thereunder.

Nor do we think the Debs case an authority for the maintenance of this suit. The Debs case was distinctly placed on the ground that the Acts restrained, interfered with the United States mails and Interstate Commerce; and that the United States has an ownership of the mails while in transit, and controlled Interstate Commerce.

The case of *United States* v. *Allen*, 179 Fed. 13, which was affirmed in this court, holds that this action may be maintained by the United States, although the Government has no interest in the subject matter, but only to carry out and enforce a governmental policy. As Judge Adams pointed out in his dissenting opinion, in the case, in the Circuit Court of Appeals, this establishes a new ground of equity jurisdiction. But at most, the case goes no further, and is not authority upon any other question in the case. But if it is authority for any purpose it strengthens the position of appellants, on the question of estoppel. Certainly no court of equity would say that the Indians could hail the appellant into a United States Court of Equity (as the Goodrum-Buffalo case said they had a right to do), and force them by its decree to take this title and pay for it, and then the next week, have the United States go into the same court of equity and take the land away from them. If this is not inequitable it is difficult to imagine a state of facts that would shock the conscience of a Chancellor.

Appellants respectfully submit that the judgment should be reversed.

Respectfully submitted,

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HALBERT H. MCCLUER,
ROLAND HUGHES,
Attorneys for Appellants.

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NUMBER 177.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

GEORGE E. BOWLING AND MIAMI INVESTMENT COMPANY, APPELLANTS,

VS.

THE UNITED STATES.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR APPELLANTS.

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STATEMENT AND BRIEF IN REPLY.

In reply to the statement of this case by counsel for the Government, we desire to call to the attention of the court the fact that on page 2 of appellee's brief is the following:

> "On December 2, 1897, one John E. Rundell, named as a defendant by the Bill, undertook to obtain in the title and an instrument was executed in his favor on that date by several Indians who were entitled to, or claimed, the inheritance."

This statement hardly presents the exact situation as we understand it. As we understand the situation, on December 2d, 1897, John E. Rundell, named as a defendant, but who had departed this life prior to the filing of the original bill, entered into a contract in writing for the purchase of the land which forms the basis of this litigation, which contract was entered into with the

parties, who the answer alleges, were the sole heirs of the original allottee, and which allegation of the answer stands admitted. After the execution of this contract, the said Rundell refused to carry out the same and declined to make the purchase and in order to hold him to his contract, the owners of the land instituted a suit for specific performance in the United States Court. This refusal on the part of Rundell to carry out the contract, as originally entered into by him, was apparently on account of his discovering the clause against alienation contained in the patent as originally issued. We say "apparently" for the reason that at the time this Bill was instituted, the said John E. Rundell had departed this life and there was and could have been no actual showing as to what caused him to attempt to withdraw from the contract; but from the facts which are established that shortly after entering into the contract he sought to withdraw from it and that thereafter when a suit was instituted against him for specific performance he appeared and filed an answer in which he set forth as his reason for not being required to carry out the same, the clause against alienation contained in the patent, make it reasonable to suppose that the discovery of that clause by him was the inducing cause of his attempted withdrawal from therefrom.

On page 3 of appellee's brief appears this statement:

> "The Bill alleges that this suit (referring to the suit for specific performance) was fraudulent and collusive—a scheme whereby Rundell sought under color of a court decree to evade the restrictions affecting the land; that it was not a real and substantial controversy between the parties."

These allegations, it is true, were contained in the Bill, but they were denied by the answer, and the answer not only specifically denied these allegations, but affirmatively charged and stated that the suit referred to "was brought in good faith and so prosecuted for the purpose of determining the rights of the respective parties to said contract," and these allegations of the answer stand admitted, so the case stands as if the above allegations of the Bill had been omitted therefrom, and can and should in no manner affect the determination of this case.

Again, on page 3 of appellee's statement is this allegation:

> "It affirmatively appears in the Bill and is not contradicted in the answer, that the Government was in no sense a party to, or represented in, those proceedings (referring to the specific performance suit above mentioned)."

While it is true that the Government was not a formal party to the suit, that is, it was not named or designated as a party plaintiff or a party defendant, it is the contention of the appellants herein that it was, in fact and in reality, a party to the suit as the suit was conducted throughout in a Governmental Court, under Governmental control, to which the appellants were compelled to answer, and to whose decree they were compelled to bow. The United States Court which tried this specific performance case was established by the Government. Its officers were appointed by the President; it was given jurisdiction over the territory in which the plaintiffs and defendants in that suit lived, and was given jurisdiction over suits of the kind and character presented; the appellants were compelled, when sued in that court, to abide by and carry out any decree entered. It stands admitted that an actual controversy existed between the owners of the land involved and said John E. Rundell. He had made a contract agreeing to purchase this land. Apparently on account of a restriction in the patent by which the land had been conveyed to the original owner, he sought to withdraw from his contract. The owners of the land denied him that right, claiming that the contract was perfectly valid and that the restriction in the patent did not apply to them. This raised an actual controversy and dispute between the parties. The land owner, in order to have this controversy determined, turned to the United States Court established for the purpose of determining disputes that might arise just as this dispute arose. They filed their Bill in Equity. John E. Rundell was brought into court; he appeared and in due time filed his answer. In this answer he claimed the benefits of the restrictions above noted, to protect him against being required to carry out the contract. This matter was heard by the court and was determined in favor of the land owner and against Rundell and a decree was entered requiring him to pay the balance of the purchase money, called for by the contract, and accept the deed tendered as full compliance by the owners of the land for their part of the contract. Under compulsion and direction of the United States authorities, he made the payment and accepted the deed and appellants contend that the Government was actually, through its officers and courts, a party to this transaction and should not now in equity and good conscience be permitted to say that its own court committed an error in deciding the case and that, although it, itself, through its officers and courts, compelled said John E. Rundell to part with his money and accept the deed, he or his grantees shall now be deprived of the title to the land so thrust upon him.

If the controversy that existed between these parties could not be settled by a resort to the United States Court, in what manner could they have settled it?

Again, appellee desires to call to the attention of the court the fact that a restriction against alienation very similar to the one involved in this case, which was contained in a patent issued to a member of this same band of Indians before even they had been removed to Kansas from whence they were transferred to the Indian Territory, but while still in Indiana was constructed by Justice McLain in the case of *Lowry* v. *Weaver*, 4th McLain, 82 (Fed. Cases, 8584), as being personal and not running with the land and that after this opinion had been delivered by Justice McLain that a manuscript copy of the same was sent to the Secretary of War, who, at that time, had charge of Indian affairs, and that the Secretary of War transmitted the same to the Attorney General, for his opinion and advice in relation to the same, and that the Attorney General in an opinion found in 4th Opinion Attorney General at page 529, concurred in the opinion so delivered by Justice McLain, and that the opinion of the Attorney General was transmitted to and filed in the office of the Secretary of War and thereafter became and was the settled Governmental construction of a stipulation restricting alienation of the kind and character involved in this case.

We desire to further add that it would appear that when the Congress of the United States passed the Act under which the patent involved in this case was issued and used essentially the same language that had been construed by Justice McLain and by the Attorney General, and which had received a settled Governmental construction and which construction had been uniformly followed by the decisions of the various courts, as shown in our original brief, that it was the intent of Congress that the restriction they were then passing should receive the same construction that had previously been given it by the United States Court, by the Attorney General, by the Indian Department, and by the courts of the various states.

The above was the condition of the law when Judge Springer decided this specific performance case, and appellants submit that in deciding that case he followed and was guided by the construction of an exactly similar clause against alienation that had been considered as settled years before, and that his decision was right.

On page 15 of the brief on behalf of the United States counsel make use of this language:

> "The question whether the restriction or alienation would have perished after the land had passed by inheritance to some person—*sui juris*, a white person, for instance not a member of any tribe—is not presented."

In regard to this statement we desire to say that while it is true that the bill alleges that the parties who made the conveyance to Rundell were members of the Peoria-Miami band of Indians in the Indian Territory, and while the answer does not specifically deny this allegation there is a general denial in the answer which it would seem would be sufficient to put that question in issue. However, whether the parties who made this conveyance were members of the said band of Indians in the Indian Territory is as we conceive it utterly immaterial. But we do not conceive that the question is not before the court as to whether or not the restriction on alienation perished if the land passed by inheritance to persons *sui juris*. For in this case it is the contention of appellants that the parties who made this conveyance whether members of an Indian band or otherwise were parties *sui juris;* that they were citizens of the United States with all the rights, privileges and immunities of such; and had the right to contract and be contracted with, to sue and be sued, just the same as any other person, whether they had Indian blood or otherwise; that they had been so specifically made by a special Act of Congress which has been set forth in our original bill. It appears to appellants that if this original allottee from whom these parties who made this conveyance inherited the land had left the Indian Territory and come to Kansas, Missouri, or any other state, as he undoubtedly had a right to do, he would have been there a citizen with all the rights of any other citizen, including the right to purchase and dispose of property without let or hindrance, and if he had obtained title to any property and had died the owner thereof, the same would have been transferred to these same heirs, who could have sold it upon such terms, and in such a manner, and without any restriction, as to them seemed just and proper. The fact that the land in this case was in the Indian Territory could make no difference unless the title by which the land was held had a restriction which ran with the land and which of itself would prevent an alienation whether it was owned by parties of Indian blood or otherwise. If this restriction was one that inhered in the land,—

was a restricted title, one that prevented the conveyance of the land itself,—then it would appear to us that no conveyance could have b en made of same by heirs whether they were white persons or Indians. But if upon the other hand the restriction upon alienation was personal and was not one that fastened itself upon the land, that then in that case the heirs would have inherited the land under the laws of Kansas as prescribed by the Allotment Act and would have an absolute right to convey it whether of Indian blood or otherwise, provided they were parties *sui juris*, as were the grantors in this case.

This whole argument of the Government is almost a concession of appellants' contention that this restriction was merely a personal one, because it would appear that if it was not personal then the question as to status of the owners whether citizens or otherwise could not arise. There could be no distinction as to the right of these grantors to sell this land and their right to sell any other land that they may have inherited from the same ancestors, unless it was from restrictions in the title which went with the land and passed with it, fastened thereon from the ancestors to them, which the appellants contend was not the case.

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v.
THE UNITED STATES.
No. 177.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was brought against the appellants and other defendants for the purpose of clearing the title to an Indian allotment in Oklahoma. After a demurrer to the bill had been overruled (R., 21, 24) a separate answer was interposed by the defendants (R., 26), the case was set down for hearing upon that answer and the bill, and a decree was thereupon rendered in favor of the United States (R., 38). Upon appeal to the Circuit Court of Appeals for the Eighth Circuit the decree was affirmed. (Opinion, R., 52; 191 Fed., 19.)

From the bill and answer it appears that the land in question, approximately 200 acres in area, was patented on April 8, 1890, to Pe-te-lon-o-zah, or

William Wea, a member of the confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians. The patent (R., 12) contains the following express restrictions:

> *Provided*, That the said lands shall not be alienated nor subject to levy, sale, taxation, or forfeiture for a period of twenty-five years from the date hereof, and any contract or agreement to sell or convey said land before the expiration of said period shall be absolutely null and void; to have and to hold the said land with the appurtenances thereunto belonging unto the said Pe-te-lon-o-zah, or William Wea, and to his heirs forever, with proviso as aforesaid.

It was issued under and in pursuance of the act of March 2, 1889 (25 Stat. 1013), the relevant provisions of which will be hereinafter discussed. The patentee died intestate on or about January 23, 1894, leaving Indian heirs who inherited the land. On December 2, 1897, one John R. Rundell, named as a defendant by the bill, undertook to obtain the title, and an instrument was executed in his favor on that date by several Indians who were entitled to or claimed the inheritance. The consideration agreed upon (according to the answer) was $1,000, of which $25 was paid down and the balance withheld. Subsequently a suit for specific performance was instituted against Rundell in the names of his Indian grantors (R., 7, 13, 35) in the United States court for the Northern District of the Indian Territory. Rundell answered (R., 15) and a decree was entered requiring him to

take title and pay the balance of the consideration money. The bill alleges (R., 8) that this suit was fraudulent and collusive—a scheme whereby Rundell sought under color of a court decree to evade the restrictions affecting the land; that it was not a real and substantial controversy between the parties, but a collusive proceeding in which Rundell controlled the plaintiffs and employed their attorney; that the decree resulted from the fraud and deception practiced by the parties on the court, and that the court had no jurisdiction to render it. The answer (R., 32) denies these things and relies upon the decree as an estoppel (R., 36). But it affirmatively appears in the bill, and is not contradicted in the answer, that the Government was in no sense a party to, or represented in, those proceedings.

There were various mesne conveyances under the the Rundell deed in virtue of which the appellants claims title. The bill seeks to have these, as well as the decree of the Indian Territory Court, declared to be void.

Treaties and Legislation involved.

By the treaty of October 29, 1832 (7 Stat. 410), the Piankeshaw and Wea Tribes of Indians relinquished to the United States the lands which they then held in the States of Missouri and Illinois, and received from the Government "for their permanent residence, two hundred and fifty sections of land within the limits of the survey of the lands set apart for the Piankeshaws, Weas, and Peorias," in a region now included within the boundaries of Kansas.

By the treaty of May 30, 1854 (10 Stat. 1082), the Piankeshaw and Wea Tribes became consolidated with the Kaskaskias and Peorias, who had received a similar grant (treaty of Oct. 27, 1832; 7 Stat. 403), and the consolidated tribe re-ceded the Kansas lands to the United States, reserving a quantity sufficient to supply each member then living with an allotment of 160 acres, and reserving in addition 10 sections to be held as the common property of the tribe (art. 2). The United States agreed to survey the ceded lands and to sell them for the benefit of the Indians. The allotments as well as the common tract were to be selected, before the ceded lands were sold, in the manner described in the third article, which provided that "patents for the lands selected by or for individuals or families may be issued subject to such restrictions respecting leases and alienation, as the President or Congress of the United States may prescribe." The restrictions which were expressed in the allotment patents subsequently issued have been found by this court to be like those contained in similar patents issued to the Shawnees, which provided: "The said lands shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior." (*The Kansas Indians*, 5 Wall. 737, 740, 741.)

The act of March 3, 1859 (11 Stat. 425, 430), section 11, provided:

> That in all cases where, by the terms of any Indian treaty in Kansas Territory, said Indians

> are entitled to separate selections of land, and to a patent therefor, under guards, restrictions, or conditions for their benefit, the Secretary of the Interior is hereby authorized to cause patents therefor to issue to such Indian or Indians, and their heirs, upon such conditions and limitation, and under such guards or restrictions as may be prescribed by said Secretary.

By the treaty of February 23, 1867 (15 Stat. 513), arrangements were made for moving this consolidated tribe and other tribes of Indians out of Kansas to the Indian Territory. By article 21 it was provided that the United States should sell the common tract (then consisting of nine and one-half sections), and receive the proceeds for the benefit of the tribe. By article 22 a body of land in the Indian Territory which under this same treaty was purchased from the Senecas and Quapaws, was granted to the Weas and their associates for the same price which the Government had agreed to pay the previous owners, and for the accomplishment of this transaction it was agreed that the money to be derived from the sale of the nine and one-half sections, supplemented, if necessary, by other funds of the consolidated tribe then held by the United States, should be used in supplying the consideration agreed upon with the Senecas and Quapaws. The Wea and associated Indians agreed, by article 23, "to dispose of their allotments in Kansas and remove to their new homes in the Indian country," and to that end the Secretary of the Interior was "authorized to remove altogether the restrictions upon the sales

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of their [Kansas] lands, provided under authority of" the treaty of 1854, *supra*, "in such manner that adult Indians may sell their own lands, and that the lands of minors and incompetents may be sold by the chiefs, with the consent of the agent, certified to the Secretary of the Interior and approved by him."

Article 26 permitted a confederation with the Miamis upon the new reservation.

This new reservation is situate in the northeast corner of the present State of Oklahoma and includes the land involved in this controversy.

The act of March 3, 1873 (17 Stat. 631), made provisions for the disposition of the lands of the Miami Tribe in Kansas, and for its consolidation with the Weas, etc., on their reservation in Indian Territory. The Secretary of the Interior was directed to make a census of the Miamis, consisting of two lists, one containing the names of those desirous of becoming citizens of the United States, and the other the names of those "who elect to remain under the care of the United States, and to unite with the Wea, Peoria, Kaskaskia, and Piankeshaw Indians" (sec. 4). By section 3 those members who desired to become citizens of the United States were to apply to the circuit court of the United States in Kansas, and prove by at least two competent witnesses to that court's satisfaction that they were sufficiently intelligent and prudent to manage their own affairs, and had for a period of five years been able to maintain themselves and families, and had adopted the habits of civilized life. Naturalization was to follow as in

the case of aliens, and thereupon the Secretary of the Interior might, at the request of any such persons, cause the lands severally held by them and their minor children (in Kansas) to be conveyed to them "by patent in fee simple, without the power of alienation." He might also from time to time award them their proportion of tribal moneys, "after which," the third section provides, "said Indians and their minor children shall cease to be members of any Indian tribe; but the land so patented to them shall not be subject to levy, taxation, or sale during the natural lives of said Indians or of their minor children." The remaining Indians, constituting the Miami Tribe, were to be consolidated with the Weas, etc., under the name of the "United Peorias and Miamis." Pecuniary adjustments were arranged, and it was provided (sec. 6) that after the union the members of this consolidation should draw equal annuities and all have an interest in the reservation.

Neither this statute nor the treaty of 1867, *supra*, authorized allotment of the lands in the Indian Territory. By the general allotment act of February 8, 1887 (24 Stat. 388), Congress made provision for the allotment of lands in severalty to the Indians on reservations generally, but excepted a number of reservations from the operation of the act and among them that of the "Miamis and Peorias." (Sec. 8.) However, by the act of March 2, 1889, *supra*, the provisions of the general allotment act of 1887, with certain modifications, were extended to the reserva-

tion of these confederated bands, and the allotment involved herein was made under the provisions of that act. Its pertinent provisions are:

> * * * That the provisions of chapter one hundred and nineteen of the acts of eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," are hereby declared to extend to and are made applicable to the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw Tribes of Indians, and the Western Miami Tribe of Indians, now located in the northeastern part of the Indian Territory and to their reservation, in the same manner and to the same extent as if said tribes had not been excepted from the provisions of said act, except as to section six of said act, and as otherwise hereinafter provided.
>
> That the Secretary of the Interior is hereby authorized and directed, within ninety days from and after the passage of this act, to cause to be allotted to each and every member of the said Confederated Wea, Peoria, Kaskaskia, and Piankeshaw Tribes of Indians, and the Western Miami Tribe of Indians, upon lists to be furnished him by the chiefs of said tribes, duly approved by them, and subject to the approval of the Secretary of the Interior, an allotment of land not to exceed two hundred acres, out of their common reserve, to each

person entitled thereto by reason of their being members of said tribes by birth or adoption; all allotments to be selected by the Indians, heads of families selecting for their minor children, and the chiefs of their respective tribes for each orphan child.

* * * * *

The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause the patent to issue to each and every person so entitled, for his or her allotment, *and such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent*, and shall also recite that such land so allotted and patented is not subject to levy, sale, taxation, or forfeiture for a like period of years, *and that any contract or agreement to sell or convey such land or allotments so patented entered into before the expiration of said term of years shall be adsolutely null and void.*

SEC. 2. That in making allotments under this act no more in the aggregate than seventeen thousand and eighty-three acres of said reservation shall be allotted to the Miami Indians, nor more than thirty-three thousand two hundred and eighteen acres in the aggregate to the United Peoria Indians; and said amounts shall be treated in making said allot-

ments in all respects as the extent of the reservation of each of said tribes, respectively * * * After the allotments herein provided for shall have been completed, the residue of the lands, if any, not allotted, shall be held in common under present title by said United Peorias and Miamis in the proportion that the residue, if any, of each of the said allotments shall bear to the other. And said United Peorias and Miamis shall have power, subject to the approval of the Secretary of the Interior, to lease for grazing, agriculture, or mining purposes from time to time and for any period not exceeding ten years at any one time, all of said residue, or any part thereof, the proceeds or rental to be divided between said tribes in proportion to their respective interests in said residue. And after said allotments are completed each allottee may lease or rent his or her individual allotment for any period not exceeding three years, the father acting for his minor children, and in case of no father then the mother, the chief acting for orphans of the tribe to which said orphans may belong.

At the expiration of twenty-five years from the date of the passage of this act, all of said remaining or unallotted lands may be equally divided among the members of said tribes, according to their respective interests, or the same may be sold on such terms and conditions as the President and the adult members of said tribe may hereafter mutually agree upon, and the proceeds thereof divided according to ownership as hereinbefore set forth: *Provided*, That before any division of the land is made,

> or sale had, that three-fourths of the bona-fide adult members of said tribes shall petition the Secretary of the Interior for such division or sale of said land: *Provided further*, That sections one and two of this act shall not take effect until the consent thereto of each of said tribes separately shall have been signified by three-fourths of the adult male members thereof, in manner and form satisfactory to the President of the United States.

The Indians who received allotments were made citizens of the United States by section 43 of the act of May 2, 1890 (26 Stat. 81, 99), which declares that:

> The confederated Peoria Indians residing in the Quapaw Indian Agency, who have heretofore or who may hereafter accept their land in severalty under any of the allotment laws of the United States, shall be deemed to be, and are hereby, declared to be citizens of the United States from and after the selection of their allotments, and entitled to all the rights, privileges, and benefits as such, and parents are hereby declared from that time to have been and to be the legal guardians of their minor children without process of court: *Provided*, That the Indians who become citizens of the United States under the provisions of this act do not forfeit or lose any rights or privileges they enjoy or are entitled to as members of the tribe or nation to which they belong.

The act of June 7, 1897 (30 Stat. 62, 72), provided:

> That the adult allottees of land in the Peoria and Miami Reservation in the Quapaw Agency,

> Indian Territory, who have each received allotments of two hundred acres or more may sell one hundred acres thereof, under such rules and regulations as the Secretary of the Interior may prescribe.

The act of May 31, 1900, section 7 (31 Stat. 221, 248), after declaring that the adult *heirs* of deceased allottees of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma might sell their inherited lands "*subject to the approval of the Secretary of the Interior*," extended the same permission to the Peorias and Miamis as follows:

> That the provisions hereof as to the sale of inherited lands by heirs of deceased allottees of the Citizen Band of Pottawatomie Indians and Absentee Shawnee Indians are hereby extended and made applicable to the heirs of allottees of the Peoria and Miami Indians, who were authorized by the act approved June seventh, eighteen hundred and ninety-seven, to sell a portion of their lands, and all sales and conveyances of lands of deceased allottees by their heirs, which have been duly made and executed by such heirs and duly approved by the Secretary of the Interior, are hereby ratified and confirmed.

By section 7 of the Indian appropriation act of May 27, 1902 (32 Stat. 245, 275), it was provided:

> That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such de-

cedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, *but all such conveyances shall be subject to the approval of the Secretary of the Interior*, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: *Provided*, That the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children.

ARGUMENT.

I. Without the consent of the Secretary of the Interior, the heirs were powerless to sell the allotment.

1. The act of March 2, 1889, plainly declares, not that the allottee may not alienate, but that the land itself shall not be subject to alienation for a period of twenty-five years from the date of patent. In the absence of any clear and controlling reason to the contrary the act should be applied according to this obvious meaning of its language.

2. Neither in the antecedents of the act nor in any consideration of necessity or convenience respecting its policy can an excuse be discovered for depart-

ing from its letter. On the contrary, to imply an exception in favor of the alienation of inherited lands would be productive of hardship and injustice and tend to defeat the protective purposes of the act and the objects of the reservation.

3. The acts of May 31, 1900, and May 27, 1902, which provide, the former with reference to this reservation specifically and the latter generally, that restricted allotments when inherited may be sold by the heirs *subject to the approval of the Secretary of the Interior*, remove all doubt, if any there can be, concerning the intention of the act of March 2, 1889.

4. The decision of the court below accords with the authorities.

II. The decree of the United States court for the Indian Territory is null and void.

III. The United States is entitled to maintain this suit in its own name.

I.

Without the consent of the Secretary of the Interior the heirs were powerless to sell the allotment.

It sufficiently appears that the heirs of the allottee were themselves members of the confederated tribes, and the case has been tried throughout upon that theory. The bill avers (R. 2, paragraph second), that it is brought on behalf of certain members of the confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes, "to wit, the unknown heirs of Petelonozah or William Wea, deceased," as well as on behalf of the United States; and it also alleges (R. 9, top)

that the persons who made the conveyance to Rundell, under which the appellants claim, "were members of the Peoria-Miami Band of Indians in the Indian Territory." Although these allegations regarding the status of the allottee's heirs and the appellants' remote grantors are not as full and distinct as they might be, they leave no doubt, when read with the whole bill, that the purpose was to characterize the heirs, whoever they were, and the makers of the deed (who, according to the answer, were in fact the only heirs, R. 34, paragraph XVI), as tribal members. Upon this proposition the appellants have made no issue, either in their answer or subsequently; and the court below (opinion, R. 52) accepted it as true.

Consequently, the question whether the restriction on alienation would have persisted if the land had passed by inheritance to some person *sui juris*—a white person, for instance, not a member of any tribe—is not presented. We will assume that the status of heirs and ancestors was the same, and that if any objection had been taken to the bill in that regard, it could and would have been obviated by an amendment in accordance with the fact.

> *1. The act of March 2, 1889, plainly declares, not that the allottee may not alienate, but that the land itself shall not be subject to alienation for a period of twenty-five years from the date of patent. In the absence of any clear and controlling reason to the contrary, the act should be applied according to this obvious meaning of its language.*

The language of the statute under which the allotment was made, and which furnished the only authority for making it, is in absolute accord with the decision of the court below:

> The *land* so allotted *shall not be subject to alienation* for twenty-five years from the date of issuance of patent therefor, and said *lands* so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. * * *
>
> Such patent shall recite in the body thereof that the *land* therein described and conveyed *shall not be alienated* for twenty-five years from the date of said patent, and shall also recite that such *land* so allotted and patented is not subject to levy, etc. * * *
>
> *Any* contract or agreement to sell or convey such *land or allotments* so patented entered into before the expiration of said term of years *shall be absolutely null and void.*

These words are too plain to justify construction. If Congress had intended that the restriction should die with the original allottee, it would naturally have provided in terms that the land should remain inalienable during his lifetime, not exceeding twenty-five years from the date of the grant, as was done in the case of the Choctaw and Chickasaw homesteads. See *Mullen* v. *United States* (224 U. S. 448, 453). If any reason can be found to warrant a departure from the language of this statute it must be extrinsic to the statute itself, and so clear and satisfactory that no doubt may be admitted of its soundness.

> *2. Neither in the antecedents of the act nor in any consideration of necessity or convenience*

> *respecting its policy, can an excuse be discovered for departing from its letter. On the contrary, to imply an exception in favor of the alienation of inherited lands would be productive of hardship and injustice and tend to defeat the protective purposes of the act and the objects of the reservation.*

This reservation, when established by the treaty of February 23, 1867, *supra*, was undoubtedly intended as a permanent home for tribal Indians. It was a part of the Indian Territory, which at that time was looked upon as a region set apart for Indians exclusively for an indefinite period. The Indians who came to the reservation were such as desired to continue their tribal life or were incompetent to live any other successfully. Those members of the Peorias, Weas, Kaskaskias, and Piankeshaws who wished to do so, were permitted by article 28 of the treaty to remain in Kansas, become citizens, and sever their tribal relations. The rest, including presumably all or most of the unprogressive and incompetent, moved to the new domicile away from contact with the white men, whose immigration into Kansas (*The Kansas Indians*, 5 Wall. 737) was doubtless responsible for the change. In like manner, by the act of March 3, 1873, *supra*, the competent Miamis were sifted from the incompetent, and the latter were united with the Weas and their associates. Neither the treaty of 1867 nor the act of 1873 made any provision for allotting the reservation. The general allotment act of 1887 excluded it expressly. The

allotment plan originated with the act of 1889, under which the patent of William Wea was issued. There is nothing in the antecedents of that act to supply color for a departure from its plain terms. If it were permissible to consider what was done in Kansas before this reservation was created, the result would be hostile to the appellants' contention, for, as we have seen, the patents issued to the Weas, etc., under the treaty of May 30, 1854, provided that the lands patented should "never be sold by the grantee *or his heirs* without the consent of the Secretary of the Interior," and these Indians (not considering now those who may have elected to become citizens and drop out of the tribe when it moved) were never made competent to sell any of their lands in the absence of such consent.

Similar patents were issued to the Miamis under their treaty of June 5, 1854 (art. 3, 10 Stat. 1093), *The Kansas Indians* (5 Wall. 737, 742). Congress found it necessary to pass a special act (June 23, 1873, 17 Stat. 417) to permit the State of Kansas to remove these restrictions "in all cases in which the title has legally passed to citizens of the United States *other than Indians*." The cases contemplated by this special act must have been largely if not exclusively cases of inheritance by white people. Even those Miamis who under the act of March 3, 1873, *supra*, were permitted to become citizens and end their relations with the tribe were not intrusted with the power to sell their Kansas allotments. Their patents were to be "without the power of alienation";

the allotments were not to be sold "during the natural lives of said Indians or of their minor children," and this although they were obliged by the act to prove to the satisfaction of the Circuit Court that they were sufficiently prudent and intelligent to manage their own affairs, that they had for a period of five years been able to maintain themselves and their families, and had adopted the habits of civilized life. So little, then, was the trust reposed in the ability of the most progressive and competent of the Miamis, and so much the more emphatic is the presumption that the others, who remained with the tribe, were regarded as unfit to have control of property. The status of these last, thus brought out prominently by the process of elimination, lends a side light upon the status of the Weas, Peorias, etc., with whom they were thenceforth mingled. The reservation became the home of various bands of tribal Indians, whose members had never been intrusted with dispositive power over the parcels of land which they had previously possessed in severalty elsewhere.[1]

[1] The sale of allotments in Kansas by the Weas, etc., was an incident to the removal of those bands to the Indian Territory. The Indians undertook to dispose of their allotments and to move within two years, and to that end the Secretary of the Interior was "authorized to remove the restrictions, in such manner that adult Indians may sell their own lands, and that the lands of minors and incompetents may be sold by the chiefs, with the consent of the agent, certified to the Secretary of the Interior and approved by him." (Treaty of Feb. 23, 1867, *supra*, art. 23.) This language, we think, left all the sales under the Secretary's superintendence. Besides, the principal reasons for the restrictions as to those lands ceased with the removal of the Indian owners.

Coming back to the act of 1889, the only conceivable excuse for excepting inherited lands must depend upon a theory that their protection is unnecessary. Such a theory would be speculative and wholly unreasonable. The act provides that an allotment of "not to exceed" 200 acres shall be made to each member, adult or minor; that the allotments to the Miamis shall all be taken from a specified aggregate acreage, and the allotments to the United Peorias (including the Weas, etc.), all from another specified aggregate acreage; that the residue of the lands, "*if any*," shall be held in common by the Miami and United Peoria Tribes "in the proportion that the residue, *if any*, of each of the said allotments [*sic*, evidently referring to the two specified acreages] shall bear to the other"; and that, at the expiration of 25 years from the date of the act, the remaining or unallotted lands may be partitioned, or, with the agreement of the President, sold, etc. The allotments are to be made within 90 days from the passage of the act, by the Secretary of the Interior, upon lists furnished by the chiefs. The scheme contemplates the possibility that the allotments may consume the whole reservation, except small parcels devoted to school, church, and cemetery uses, and makes no provision, otherwise than through inheritance (see General allotment act of 1887, sec. 5, 24 Stat., 388, referred to by sec. 1 of this act of 1889), for those members who may be born during the 25-year period. Hence it does not follow that lands inherited will in

all cases be cumulative to lands derived by direct allotment. In many cases they may constitute the only estate of members born after the allotments have been completed and even attaining majority before the period of restriction expires.

Again, the land which an allottee inherits may be of vastly more consequence to his comfort and welfare than his own direct allotment. Often, as in the case of a child dwelling with his parents, or a wife with her husband, the inheritance will have been the home, where all interests have centered and all improvements have been made, while the direct allotment has remained uncultivated and neglected. The appellant's construction would permit a defenseless widow or daughter to sell the home from over her head or the farm from under her feet for a song.

Finally, the object of the reservation was to protect the Indians from contact with outsiders as well as to provide them with a place to inhabit and cultivate. This policy would be defeated if the Indians were made free to convey their inherited lands without supervision and without regard to the character and desirability of their grantees. Only when Congress has said so expressly should such a policy be deemed abandoned.

3. The acts of May 31, 1900, and May 27, 1902, which provide, the former with reference to this reservation specifically and the latter generally, that restricted allotments when inherited may be sold by the heirs subject to the approval of the Secretary of the Interior, remove

all doubt, if any there can be, concerning the intention of the act of March 2, 1889.

Upon the propriety of resorting to these statutes see:

United States v. *Freeman*, 3 How. 556, 564.

Tiger v. *Western Inv. Co.*, 221 U. S. 286, 309.

4. The decision of the court below accords with the authorities.

In *United States* v. *Aaron* (183 Fed. 347), decided in the circuit court for the western district of Oklahoma, the fourth subdivision of section 2 of the Osage Allotment act of June 28, 1906 (34 Stat. 539) where it is provided that the homestead allotments "shall be inalienable and nontaxable until otherwise provided by act of Congress," was held to prohibit the alienation of such an allotment by the heir of a deceased allottee, and the deeds were canceled. The court said (p. 351):

> The act furnishes its own policy and limitations. The language used relative to the homestead in subdivision 4 of section 2 is that it "shall be inalienable and nontaxable until otherwise provided by act of Congress." The expression of the act is not that the allottee or member shall not alienate, but that the land shall be inalienable. The restriction, therefore, runs with the land, and the policy of the law is that its protection extends as well to the heirs as to the original allottees.

This ruling was affirmed by the circuit court of appeals, Judge Sanborn, who wrote the opinion, saying:

> Restrictions upon alienation of this character attach to and run with the land, and the

> inability to convey disqualifies the heir as well as the immediate allottee.
>
> *Aaron* v. *United States*, 204 Fed. 943, 944.

In *Goodrum* v. *Buffalo* (162 Fed. 817) the same conclusion was reached respecting the restriction imposed on Quapaw allotments by the act of March 2, 1895 (28 Stat. 907), viz, that the "lands shall be inalienable for a period of twenty-five years from and after the date of said patents." The Circuit Court of Appeals there said (p. 823):

> It was as much within the policy and purpose of the Government to see that the heirs of the allottee, in case of his death, were protected against alienation of the land, as the allottee himself; otherwise, they might become a charge upon the public, and the beneficent policy of the Government in bringing about the allotment of lands in severalty would be thwarted.

See, also, to the same effect, *Choctaw-Chickasaw Cases* (199 Fed. 813).

Several State cases which the appellants have cited will now be briefly discussed.

McMahon v. *Welsh* (11 Kans. 280) involved lands patented to an "incompetent" Wyandotte Indian under the treaty of January 31, 1855 (10 Stat. 1159, 1161), with a restriction on alienation. The lands descended to and were conveyed by an heir who, according to the statement of facts in the case, as the court construed it, belonged to a class whose members, as "competent," were equipped by that treaty with the entire control over their interests and

affairs. The conveyance was made in 1864. A treaty ratified in 1868 expressly removed all restrictions upon the sale of lands previously patented to "incompetents" and authorized the Secretary to *confirm* sales previously made by Indians of that class. The conveyance in question was confirmed by him in 1871. The taxes in controversy were assessed and levied for the year 1870; and one problem discussed by the court was whether the land was then taxable, the conveyance not having then been confirmed. The opinion assumes that the lands were taxable if alienable. The court was of the opinion that when the land passed by descent from the incompetent to the competent Indian it became alienable—a conclusion which, obviously, has no bearing on the present case, since, by hypothesis, the land when conveyed was owned by one who, by force of the earlier treaty, had been specifically emancipated in respect of all his property and affairs.

Frederick v. *Gray* (12 Kans. 518). The issue was between a sheriff's deed, purporting to convey land of an incompetent Wyandotte, and a conveyance subsequently made by her heirs. The competency of the heirs to convey was not questioned. The only question was whether, when they undertook to do so, the title was beyond their reach, by reason of the sheriff's deed and certain other proceedings of no interest in the case at bar.

The Commissioners of Miami County v. *Brackenridge* (12 Kans. 114) involved the Miami treaty of June 5, 1854 (10 Stat. 1093), which declared that

the lands patented to the Indians should not be "liable to levy, sale, execution or forfeiture." The court held that after allotted lands had been lawfully sold to a white man a continuation of this exemption would be foreign to the treaty. "The exemption was based upon the use by the Indians, and when that use ceased the exemption also ceased" (p. 123). The case is clearly not in point.

Clark v. *Lord* (20 Kans. 390) involved the construction of the Ottawa treaty of June 24, 1862 (12 Stat. 1237), the seventh article of which provided that in patents issued for allotted lands it should be "stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or encumber the land allotted to him or her in any manner, until they shall, by the terms of this treaty, become a citizen of the United States." Of this provision the court said (p. 395):

> The reservation, as to the conveyance, is personal, from the language used, and was not intended to bind the heirs of allottees.

The conclusion was based entirely upon, and is undoubtedly accordant with, the letter of the treaty, which differs so materially from the act of 1889 that the decision has no value as a precedent. Furthermore, the heir who made the deed in question was "under no legal disability," according to the findings of fact, and was therefore within the express permission of the treaty.

The case last cited relies on *Farrington* v. *Wilson* (29 Wis. 383), in which a similar restriction was

involved, viz, "not to be leased or sold *by the grantee*," etc., and in which also the court's opinion (p. 397) was based entirely upon the narrow terms in which the restriction was couched.

II.

The decree of the United States court for the Indian Territory is null and void.

As was held in *Heckman* v. *United States* (224 U. S. 413), the maintenance of limitations prescribed by Congress as part of its plan for distribution of Indian lands is distinctly an interest of the United States, and one which it may sue in its own courts to enforce. A transfer of allotted lands in violation of statutory restrictions is not simply a violation of the proprietary rights of the Indians, but is a violation of the governmental rights of the United States.

In the present case the allottee and his heirs, being incapacitated by an act of Congress from conveying the allotment directly, were manifestly impotent to bring about the same result indirectly by proceedings in court. Whether the proceedings upon which the appellants rely were or were not collusive and fraudulent is a matter of no consequence. The United States was not represented. Its interest was governmental in character, distinct from any interest of the Indians, and immune to the effects of anything that they might do. The court was wholly without jurisdiction to authorize the conveyance, and its decree was void.

So it was held by the Circuit Court of Appeals for the Eighth Circuit, after full consideration respecting a like decree rendered in an indistinguishable case. *Goodrum* v. *Buffalo* (162 Fed. 817).

III.

The United States is entitled to maintain this suit in its own name.

In support of this proposition it is unnecessary to do more than refer to the recent decision in *Heckman* v. *United States* (224 U. S. 413, 436).

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

ERNEST KNAEBEL,
Assistant Attorney General.
S. W. WILLIAMS,
Attorney, Department of Justice.

MARCH, 1914.

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BOWLING AND MIAMI INVESTMENT COMPANY *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 177. Submitted April 17, 1914.—Decided May 4, 1914.

The guardianship of the United States over allottee Indians does not cease upon the making of the allotment and the allottee becoming a citizen of the United States. *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

The United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care where restrictions upon alienation have been transgressed. *Heckman* v. *United States*, 224 U. S. 413.

A transfer of allotted lands contrary to the inhibition of Congress is a violation of governmental rights of the United States arising from its obligation to a dependent people, and no stipulations, contracts or judgments in suits to which the United States is a stranger can affect its interest.

The authority of the United States to enforce a restraint lawfully created by it cannot be impaired by any action without its consent.

Restrictions on alienation imposed by acts of Congress imposed by the act of March 2, 1889, regarding the allotments to the confederated tribes specified therein, are not mere personal restrictions operative upon the allottee alone, but run with the land and are binding upon his heirs as well for the specified term.

The intent of Congress in regard to its enactments—such as those relating to restrictions on alienation of Indian allotted lands—may be indicated by subsequent enactments relating to the same subject-matter.

191 Fed. Rep. 19, affirmed.

THE facts, which involve the construction of statutes affecting the alienation of Indian allotments, are stated in the opinion.

Mr. James H. Harkless, *Mr. Halbert H. McCluer* and *Mr. Roland Hughes* for appellants:

As to location of land and history of allotment, see Acts of Congress Oct. 14, 1868, Revised; Indian Treaties, 839–848; Allotment Act, 25 Stat. 1013; Dawes' Allotment Act, 24 Stat., § 8, pp. 388, 391; *Jones* v. *Meecham*, 175 U. S. 13.

As to citizenship of allottee, see act of March 3, 1901, 24 Stat. 390; act of June 16, 1907, admitting Oklahoma to Statehood, 34 Stat. 268; *Boyd* v. *Nebraska*, 143 U. S. 135; Cooley's Const. Law, 270; *In re Heff*, 197 U. S. 488; 26 Stat. 99.

As to effect of restrictions on sale, see act of Congress under which patent was issued, § 1. 9 Am. & Eng. Ency. (2d ed.), p. 127, Title "Deeds," Note 4; 13 *Id.*, p. 794; *Anderson* v. *Corry*, 38 Am. Rep. 608; *Armstrong* v. *Athens Co.*, 70 Oh. St. 235; *Armstrong* v. *Athens Co.*, 16 Pet. 289; *Bauldin* v. *McDonnell*, 29 Michigan, 84; *Clark* v. *Lord*, 20 Kansas, 390–396; *Miami Co.* v. *Brackenridge*, 12 Kansas, 114; *Farrington* v. *Wilson*, 29 Wisconsin, 383; *Frederick* v. *Gray*, 12 Kansas, 518; *Handcock* v. *Mutual Trust Co.*, 103 Pac. Rep. 566; *Krause* v. *Means*, 12 Kansas, 267; *Libby* v. *Clark*, 118 U. S. 250; *Lowry* v. *Weaver*, 4 McClain, 82 (Fed. Cases, 8584); *McMahon* v. *Welch*, 11 Kansas, 280; *Oliver* v. *Forbes*, 17 Kansas, 130; 4 Ops. Atty. Gen. 529; Ottawa Treaty, 1862, Art. 7, 12 Stat. 1240; *Oxley* v. *Lane*, 38 N. Y. 325, 330, 351; *Pickering* v. *Lomax*, 145 U. S. 316; Treaty of Jan. 31, 1855; 7 Stat. 185, 191, 220, 297; 10 Stat. 1092, 1159, 1161; 11 Stat. 431, 583; 24 Stat. 389; 25 Stat. 1013; 26 Stat. 99, 989; 28 Stat. 334; 32 Stat. 641.

As to right of Government to maintain this suit as guardian, see *Civil Rights Cases*, 109 U. S. 25; *Ex parte Savage*, 158 Fed. Rep. 205; *In re Heff*, 197 U. S. 488; *In re Celestine*, 114 Fed. Rep. 551; *United States* v. *Boss*, 160 Fed. Rep. 132; *United States* v. *Dooley*, 151 Fed. Rep. 697; *United States* v. *Auger*, 153 Fed. Rep. 671; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273.

Suit cannot be maintained as trustee. *In re Iowa &c. Commission Co.*, 6 Fed. Rep. 801; *Libby* v. *Clark*, 118 U. S. 250; *McKay* v. *Kalyton*, 204 U. S. 458; Report Commission on Indian Affairs, 1907, p. 69; Rev. Stat., § 2296; *United States* v. *Kapp*, 110 Fed. Rep. 164.

As to organization and jurisdiction of courts in Indian Territory, see act of May 2, 1890, 25 Stat. 784; *Davenport* v. *Buffington*, 97 Fed. Rep. 237; 25 Stat. 783; *Thompson* v. *Rainwater*, 49 Fed. Rep. 406.

Buffalo v. *Goodrum*, 162 Fed. Rep. 817, is not applicable.

As to estoppel, see *Carr* v. *United States*, 98 U. S. 438; *Chope* v. *Detroit Plank Road Co.*, 37 Michigan, 195; *Cohn* v. *Burnes*, 5 Fed. Rep. 326; *Commonwealth* v. *Andre*, 3 Pick. 224; *Commonwealth* v. *Pejepscup Proprietors*, 10 Massachusetts, 155; *Vermont* v. *Society*, Federal Cases, No. 16920; *Gibbons* v. *United States*, 5 Cir. Court, 416; *Pengra* v. *Mung*, 29 Fed. Rep. 830, 836; *State* v. *Bailey*, 19 Indiana, 452; *Indiana* v. *Milk*, 11 Fed. Rep. 389; *State* v. *School Dist.*, 88 N. W. Rep. 751; *The Siren*, 7 Wall. 155; *United States* v. *Stimpson*, 125 Fed. Rep. 907, 910; *United States* v. *Wagon Road Co.*, 54 Fed. Rep. 811.

Mr. Assistant Attorney General Knaebel and *Mr. S. W. Williams* for the United States:

Without the consent of the Secretary of the Interior the heirs were powerless to sell the allotment.

The act of March 2, 1889, plainly declares, not that the allottee may not alienate, but that the land itself shall not be subject to alienation for a period of 25 years from the date of patent. In the absence of any clear and controlling reason to the contrary, the act should be applied according to this obvious meaning of its language.

Neither in the antecedents of the act nor in any consideration of necessity or convenience respecting its policy, can an excuse be discovered for departing from its letter. On the contrary, to imply an exception in favor of the

alienation of inherited lands would be productive of hardship and injustice and tend to defeat the protective purposes of the act and the objects of the reservation.

The acts of May 31, 1900, and May 27, 1902, which provide, the former with reference to this reservation specifically and the latter generally, that restricted allotments when inherited may be sold by the heirs subject to the approval of the Secretary of the Interior, remove all doubt, if any there can be, concerning the intention of the act of March 2, 1889.

The decree of the United States court for the Indian Territory is null and void.

The United States is entitled to maintain this suit in its own name.

In support of these contentions, see *Aaron* v. *United States*, 204 Fed. Rep. 943; *Bowling* v. *United States*, 191 Fed. Rep. 19; *Choctaw-Chickasaw Cases*, 199 Fed. Rep. 813; *Clark* v. *Lord*, 20 Kansas, 390; *Miami County* v. *Brackenridge*, 12 Kansas, 114; *Farrington* v. *Wilson*, 29 Wisconsin, 383; *Frederick* v. *Gray*, 12 Kansas, 518; *Goodrum* v. *Buffalo*, 162 Fed. Rep. 817; *Heckman* v. *United States*, 224 U. S. 413; *The Kansas Indians*, 5 Wall. 737; *McMahon* v. *Welch*, 11 Kansas, 280; *Mullen* v. *United States*, 224 U. S. 448; *Tiger* v. *West. Investment Co.*, 221 U. S. 286; *United States* v. *Aaron*, 183 Fed. Rep. 347; *United States* v. *Freeman*, 3 How. 556; and the following acts and treaties: act of March 3, 1859, 11 Stat. 425; act of March 3, 1873, 17 Stat. 631; act of June 23, 1873, 17 Stat. 417; act of February 8, 1887, 24 Stat. 388; act of March 2, 1889, 25 Stat. 1013; act of May 2, 1890, 26 Stat. 81; act of June 7, 1897, 30 Stat. 62; act of May 31, 1900, 31 Stat. 221; act of May 27, 1902, 32 Stat. 245; act of June 28, 1906, 34 Stat. 539; Treaty of October 27, 1832, 7 Stat. 403; Treaty of October 29, 1832, 7 Stat. 410; Treaty of May 30, 1854, 10 Stat. 1082; Treaty of June 5, 1854, 10 Stat. 1093; Treaty of February 23, 1867, 15 Stat. 513.

MR. JUSTICE HUGHES delivered the opinion of the court.

Pursuant to the act of March 2, 1889, c. 422, 25 Stat. 1013, a tract of land in the Indian Territory was allotted to Pe-te-lon-o-zah, or William Wea, a member of the confederated Wea, Peoria, Kaskaskia and Piankeshaw tribes of Indians. The patent, conveying the land to Wea and his heirs, was issued on April 8, 1890, and imposed a restraint upon alienation for a period of twenty-five years from its date. Upon the death of Wea, his heirs entered into a contract to sell the land and in a suit brought by them in the United States court for the Northern District of the Indian Territory, for the purpose of enforcing the contract, judgment was entered sustaining its validity. The property was thereupon conveyed by the heirs and passed by various mesne conveyances to the appellants.

The United States, by virtue of its interest in the enforcement of the restriction against alienation, instituted this suit to cancel these conveyances and also to set aside the above-mentioned judgment. The case was heard upon bill and answer, and a decree was rendered in favor of the United States which was affirmed by the Circuit Court of Appeals. 191 Fed. Rep. 19.

The relations of the Government to these Indians, and the legislation with respect to the lands occupied by them, may be briefly stated. In 1832, the Piankeshaw and Wea tribes of Indians ceded to the United States their interest in lands within the States of Missouri and Illinois, and lands were set apart for them in what is now the State of Kansas (7 Stat. 410), adjoining the lands assigned to the Peorias and Kaskaskias (7 Stat. 403). In 1854, the Piankeshaws and Weas were united into a single tribe with the Peorias and Kaskaskias, and the consolidated tribes ceded to the United States all their interest in the tracts theretofore assigned to them, reserving, in addition to

certain sections which were to be held as common property, a specified quantity of land for each individual, the patents for which were to be issued "subject to such restrictions respecting leases and alienation, as the President or Congress" might prescribe. (10 Stat. 1082; see *The Kansas Indians*, 5 Wall. 737, 757, 758.) By the treaty of February 23, 1867 (15 Stat. 513, 518, 519), provision was made for the sale of the common tract in Kansas and for the purchase with the proceeds of lands in the north-east portion of what is at present the State of Oklahoma; and to enable the Indians to dispose of their allotments in Kansas, the Secretary of the Interior was authorized to remove the restrictions upon sale. In 1873 (c. 332, 17 Stat. 631), members of the tribe of Miamis, so electing, were united with these confederated tribes under the name of the United Peorias and Miamis. The territory which they occupied was expressly excepted from the operation of the general allotment act of February 8, 1887, c. 119, § 8, 24 Stat. 388, 391; but the provisions of that statute, with certain exceptions, were extended to these Indians by the act of March 2, 1889, c. 422, 25 Stat. 1013.

By the latter act, the Secretary of the Interior was authorized to make an allotment of land to each member subject to the following restriction:

"The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause a patent to issue to each and every person so entitled, for his or her allotment, and such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and

shall also recite that such land so allotted and patented is not subject to levy, sale, taxation, or forfeiture for a like period of years, and that any contract or agreement to sell or convey such land or allotments so patented entered into before the expiration of said term of years shall be absolutely null and void" (§ 1, p. 1014).

It was under this provision that the land here in question was patented to William Wea, the allottee.

The confederated Peoria Indians who received allotments were made citizens of the United States by the act of May 2, 1890, c. 182, § 43, 26 Stat. 81, 99; and by 1897, it was provided that adult allottees, who had received allotments of two hundred acres or more, might sell one hundred acres under such regulations as the Secretary of the Interior might prescribe. Act of June 7, 1897, c. 3, 30 Stat. 62, 72. Subsequent provisions permitted sales by heirs of allottees, but only upon the approval of the Secretary of the Interior. Acts of May 31, 1900, c. 598, § 7, 31 Stat. 221, 248; May 27, 1902, c. 888, § 7, 32 Stat. 245, 275.

It is contended by the appellants that when the allotment was made, and the allottee became a citizen of the United States, the guardianship of the Government ceased. But this contention is plainly untenable. *Tiger* v. *Western Investment Company*, 221 U. S. 286. And it is no longer open to question that the United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care, where restrictions upon alienation have been transgressed. Since the decision below, the precise question has been determined by this court in *Heckman* v. *United States*, 224 U. S. 413, and it was there held that the authority to enforce restrictions of this character is the necessary complement of the power to impose them. It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the

United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the Government is a stranger, can affect its interest. The authority of the United States to enforce the restraint lawfully created cannot be impaired by any action without its consent. *Heckman* v. *United States*, *supra*, p. 445. If, therefore, the conveyance by the allottee's heirs, in the present case, would otherwise have been subject to cancelation, it was not saved by reason of the judgment entered in their suit against the purchaser.

The question then is, whether the restriction imposed by the act of 1889 was a merely personal one, operative only upon the allottee, or ran with the land binding his heirs as well. This must be answered by ascertaining the intent of Congress as expressed in the statute. The restriction was not limited to "the lifetime of the allottee," as in *Mullen* v. *United States*, 224 U. S. 448, 453, nor was the prohibition directed against conveyances made by the allottee personally. Congress explicitly provided that "the land so allotted" should not be subject to alienation for twenty-five years from the date of patent. "Said lands so allotted and patented" were to be exempt "from levy, sale, taxation, or forfeiture for a like period of years." The patent was expressly to set forth that "the land therein described and conveyed" should not be alienated during this period, and all contracts "to sell or convey such land" which should be entered into "before the expiration of said term of years" were to be absolutely void. These reiterated statements of the restriction clearly define its scope and effect. It bound the land for the time stated, whether in the hands of the allottee or of his heirs. Moreover, the subsequent legislation, relating to the same subject-matter, which expressly provided for conveyances by heirs of allottees subject to the approval of the Secretary of the Interior, leaves no room

for doubt as to the intention of Congress. *United States* v. *Freeman*, 3 How. 556, 564; *Cope* v. *Cope*, 137 U. S. 682, 688; *Tiger* v. *Western Investment Company*, 221 U. S. p. 309.

The conveyance by Wea's heirs came directly within the statutory prohibition, and the later conveyances under which the appellants claim must fall with it.

Affirmed.